UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22143

PENNALUNA & COMPANY, INC., BENJAMIN A. HARRISON and HARRY F. MAGNUSON,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of Orders of the Securities and Exchange Commission

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BRIEF FOR RESPONDENT SECURITIES AND EXCHANGE COMMISSION

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BRIEF FOR RESPONDENT SECURITIES AND EXCHANGE COMMISSION

JURISDICTIONAL STATEMENT

This is a petition by Pennaluna & Company, Inc., Benjamin A. Harrison and Harry F. Magnuson to review orders (R. 4622, 4661-4662) [1/] of the Securities and Exchange Commission entered April 27, 1967 and July 6, 1967 pursuant to Sections 15(b) and 19(a)(3) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78o(b) and 78s(a)(3). Based upon findings (R. 4608-4621) of willful violations of various provisions of the Securities Act of 1933 ("Securities Act"), the Exchange Act and rules under the latter Act, the order of April 27, 1967 revoked the registration of Pennaluna & Company, Inc. as a broker and dealer in securities, barred Harrison and Magnuson from being associated with any broker or dealer, and expelled Harrison from membership in the Spokane Stock Exchange. The order of July 6, 1967 denied a petition for reconsideration of the earlier order. On September 1, 1967, petitioners filed their petition to review those orders in this Court pursuant to Section 25(a) of the Exchange Act, 15 U.S.C. 78y(a).

1/ "R. ___" refers to pages of the record, and "Br. ___" refers to pages of petitioners' brief.

STATUTES AND RULES INVOLVED

[Pertinent provisions of the Securities Act, the Exchange Act and rules under those Acts are set forth in full in the statutory appendix (pp. 1a et seq., infra). Summarized here are the provisions primarily involved on this review--the registration, antifraud and anti-manipulation provisions.]

As set forth in its preamble, the Securities Act of 1933 was enacted "[t]o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof . . . ." 48 Stat. 74. The preamble to the Securities Exchange Act of 1934 describes that Act as one "[t]o provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails . . . [and] to prevent inequitable and unfair practices on such exchanges and markets . . . ." 48 Stat. 881.

Registration Provisions

The registration provisions of the Securities Act are designed to bring about the "full and fair disclosure" intended by Congress. Section 5 of that Act, 15 U.S.C. 77e, makes it unlawful to use the mails or interstate facilities to sell securities unless such securities are registered with the Commission. Sections 3 and 4 of the Securities Act, 15 U.S.C. 77c, 77d, exempt from the coverage of Section 5 various types of securities and securities transactions. The exemptions involved here are those specified in Sections 4(1) and 4(3). Section 4(1) exempts from registration, "transactions by any person other than an issuer, underwriter, or dealer"; and Section 4(3) exempts dealers' transactions where no distribution by an issuer or underwriter is involved. The

term "underwriter" is defined in Section 2(11) of the Securities Act, 15 U.S.C. 77b(11), as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking . . . ." Section 2(11) further provides that, for purposes of determining who is an underwriter, "the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

Hence, a person 2/ who purchases securities from a controlling person of the issuer with a view to the distribution of those securities, or a person who offers or sells securities for a controlling person of the issuer in connection with the distribution of those securities, is an underwriter, and therefore the Section 4(1) and 4(3) exemptions are not available for such transactions.

Antifraud and Anti-manipulation Provisions

Both the Securities Act and the Exchange Act contain broad antifraud provisions. Section 17(a) of the Securities Act, 15 U.S.C. 77q(a), and Sections 10(b) and 15(c)(1) of the Exchange Act, 15 U.S.C. 78j(b), 78o(c)(1), as implemented by Rules 10b-5 and 15c1-2 under the latter Act, 17 CFR 240.10b-5, .15c1-2, make it unlawful, through the use of the mails or interstate facilities in connection with the offer, purchase or sale of any security, to employ any device, scheme or artifice to defraud, to make any untrue statement of a material fact, to omit to state a material fact necessary to make statements made not misleading, to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, or to

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2/ Section 2(2) of the Securities Act, 15 U.S.C. 77b(2), defines "person" to include an individual, a corporation, a partnership, and an association.

employ any other manipulative or deceptive device.

Rule 10b-6 under the Exchange Act, 17 CFR 240.10b-6, is a specific anti-manipulative rule which prohibits an underwriter or other participant in a distribution of securities, or any person on whose behalf such distribution is being made, from bidding for or purchasing the securities being distributed, or any other securities of the same class and series, until he has completed his participation in the distribution.

In Section 9 of the Exchange Act, 15 U.S.C. 78i, Congress prohibited various manipulative practices with respect to securities listed or registered on national securities exchanges. Section 9(a)(2) makes it unlawful to "effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

The protection afforded by Section 9(a)(2) in the case of listed securities is extended to unlisted securities in the over-the-counter market by the general antifraud provisions discussed above. Thus, if it is proved that a person violated Section 9(a)(2) in all respects except that his manipulation was of the market of an unlisted rather than a listed security, a violation of the general antifraud provisions would be established. 3/

The exemptions found in Sections 3 and 4 of the Securities Act apply only to the registration provisions of that Act and not to the antifraud provisions of that Act or of the Exchange Act.

3/ Halsey, Stuart & Co., 30 S.E.C. 106, 111 (1950); Gob Shops of America, 39 S.E.C. 92, 103 n.20 (1959); Barrett & Co., 9 S.E.C. 319, 328 (1941).

STATEMENT OF THE CASE

A. Introduction

Pennaluna & Company, Inc. ("registrant"), one of the petitioners, is the corporate successor to the partnership of Pennaluna & Company ("Pennaluna"), a Wallace, Idaho securities firm. The Pennaluna partnership, which had registered with the Commission as a broker-dealer in 1954, was composed after 1961 of petitioner Harrison, who owned a 62-1/2 per cent interest, and petitioner Magnuson, who owned a 37-1/2 per cent interest (R. 136). In September 1963 registrant was formed to take over the business of Pennaluna, and on November 29, 1963, its registration with the Commission as a broker-dealer became effective (R. 138). From September 1963 until after the institution of the proceeding below, Harrison and Magnuson held all of registrant's capital stock in the same proportions (62-1/2 per cent and 37-1/2 per cent respectively) as their interests in the preceding partnership (R. 138). Both Harrison and Magnuson were directors of registrant during this period, with Harrison also serving as president and Magnuson as secretary-treasurer (R. 137). Magnuson and Harrison were partners in Pennaluna at all times from September 1, 1954 until the time registrant took over Pennaluna's business in late 1963 (R. 136-138).

During the period involved in this proceeding, Harrison, a member of the Spokane Stock Exchange (R. 133), operated Pennaluna's Spokane office and was in charge of all trading activities of the firm (R. 141). Harrison also edited two publications, entitled "Mining Hi Lites" and "Brokerage Information Service Reports," which were published under the sponsorship of a group of Spokane dealers including Pennaluna (R. 144). "Mining Hi Lites" was a weekly information sheet summarizing recent newspaper articles and other publications concerning various mining securities (R. 144). "Brokerage Information Service

Reports" was published a few times a year, with each issue featuring a specific mining security (R. 144). Approximately 1,000 copies of each issue of "Mining Hi Lites" were reproduced for distribution (R. 147). Pennaluna would mail between 50 and 80 of these to certain persons and firms on Pennaluna's mailing list (R. 147). Magnuson was one of the persons to whom this publication was sent by Pennaluna (R. 2190).

Magnuson is a certified public accountant who has a large accounting practice in Wallace under the name of H. F. Magnuson & Co. (R. 148). During the period in question, Magnuson was also responsible for overseeing the operations of Pennaluna's offices at Wallace and Kellogg, Idaho, and was responsible for its record-keeping activities (R. 152).

The Commission found that Pennaluna, Magnuson and Harrison willfully violated the registration, antifraud and anti-manipulation provisions of the securities laws in connection with the sale of common stock of Silver Buckle Mining Company ("Silver Buckle") and West Coast Engineering, Inc. ("West Coast"). These violations consisted of: (1) various sales of unregistered shares of Silver Buckle and West Coast stock (R. 4610-4613); (2) a manipulation of the market in Silver Buckle stock (R. 4613-4619); (3) misrepresentations and omissions of material facts in the sale of Silver Buckle and West Coast stock (R. 4613-4619); and (4) bidding for and purchasing Silver Buckle and West Coast stock while engaged in distributions (R. 4619).

B. History of Silver Buckle and West Coast

This case arises out of petitioners' activities in connection with purchases and sales of the common stock of Silver Buckle from about May 8, 1962 until Silver Buckle was merged into West Coast on June 10, 1963, and petitioners' subsequent activities with respect to West Coast Stock.

Silver Buckle was a mining company incorporated in Idaho in 1947 (R. 2194). It had an authorized capital of 10 million shares of 10 cent par value common stock (R. 3481). The prime figure in its incorporation was Dr. Frank E. Scott, a Wallace, Idaho dentist (R. 157). Throughout Silver Buckle's corporate existence Scott served as its president and as one of its fiv directors (R. 157).

In July 1953, Silver Buckle acquired a 50 per cent working interest in the mining claims of Vindicator Silver-Lead Mining Company ("Vindicator"), a Wallace corporation (R. 161). Silver Buckle considered its investment in Vindicator to be a substantial part of its total assets (R. 2194-2201, 2217). Both Magnuson and Scott were members of Vindicator's five-man board of directors and Magnuson was the secretary and later the vice-president of Vindicator (R. 2231, 2909, 4244-4281).

As a part of the financing of exploratory work of Vindicator's claims nd in purchasing Utah uranium claims in 1953, Silver Buckle, which then had approximately 5-1/2 million shares outstanding, transferred approximately 2 million additional shares of its treasury stock to New Park Mining Company ("New Park"). New Park in turn transferred part of this block of stock to East Utah Mining Company ("East Utah") and Oil, Inc. These three companies were based in Salt Lake City, Utah, and their management was centered in W. H. H. Cranmer, their president and general manager (R. 162). After this transaction, Silver Buckle's five-man board of directors consisted of Scott, Jack D. Gay 4/

4/ Gay was a business associate of Scott (R. 1552, 1553) and a partner of Gay and Scott, Investments (R. 206). Gay was treasurer, assistant secretary and a director of Silver Buckle from its inception until 1958. In 1958 he was appointed liquidating trustee of one of Scott's other corporations and, on advice of counsel, resigned as an officer and director of Silver Buckle (R. 162-163). However, he continued to act as Silver Buckle's office manager until February 1962 (R. 163).

and J. Alden Hull[5], all of Wallace, Idaho, and Crammer and Clark L. Wilson, both of Salt Lake City (R. 2194). When Gay resigned in 1958, his seat was taken over by Nolan Brown, another Wallace resident (R. 163).

In June 1960, Silver Buckle sold some of its uranium interests. After the sale the corporation remained relatively dormant while a place to invest its liquid assets of nearly $1 million was sought (R. 164). The investment vehicle decided on was West Coast, a Washington corporation engaged in the development, manufacture and distribution of automated archery targets for sale or lease to operators of archery ranges (R. 165).

West Coast was a Seattle based firm incorporated in the fall of 1960 for the purpose of dealing in heavy equipment, including mining machinery (R. 165). Shortly after its incorporation, West Coast ventured into the field of automated archery targets (R. 165). By the middle of October 1961, West Coast was in financial trouble as the result of its efforts to develop and market its automated archery targets, and the company was in need of an immediate source of funds (R. 165, 166, 169). During that month, West Coast's president contacted Magnuson, and then Scott and Gay, in an effort to secure the needed financing (R. 166).[6] In November 1961, Silver Buckle entered into an agreement with West Coast which gave it the right to obtain control of West Coast through purchases o West Coast stock (R. 166, 2268-2275). By February 1962, Silver Buckle had acquired control of West Coast and had placed Scott, Gay and

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5/ Hull was a partner in H. J. Hull & Sons, a Wallace law firm. Hull was Magnuson's personal attorney (R. 977), legal counsel for Pennaluna (R. 977), legal counsel for Silver Buckle (R. 158) and the secretary and a director of Silver Buckle (R. 162, 2231).

6/ Magnuson asserts that although he asked West Coast's president to leave some West Coast literature with him, he was unable to pursue the matter in detail at that time (R. 1132).

Nolan Brown on its five-man board of directors, with Scott as its secretary, Gay its executive vice-president, and Nolan Brown as treasurer (R. 171). Silver Buckle's directors then passed a resolution guaranteeing all of West Coast's present and future contractual indebtedness (R. 171).

Between February 6, 1962 and May 14, 1962, Silver Buckle made further cash purchases of stock from West Coast, and on the latter date increased its holdings to approximately 59 per cent of West Coast's outstanding stock by issuing to West Coast 1,999,998 shares of Silver Buckle stock in exchange for West Coast stock. By September 1962, Silver Buckle had acquired 88.41% of West Coast's outstanding stock (R. 167). At least by this date, and continuing until Silver Buckle was merged into West Coast on June 10, 1963, Silver Buckle's investment in West Coast represented, by far, its most important asset (R. 2217, 2229-2230). Silver Buckle's purchases of West Coast stock dried up the supply of West Coast stock available to the public. Hence, Silver Buckle became the trading vehicle for equities in West Coast's business, and West Coast so notified persons who inquired about its stock (R. 173; Br. 65).

By December 31, 1961, West Coast's cumulative deficit for the first 15 months of its operation had reached $73,772 (R. 169), and during 1962 the situation deteriorated further.

West Coast had leased its first 16 automated archery lanes to an archery range located at Burien, Washington in September 1961 amid widespread publicity and newspaper coverage (R. 165; Br. 22). By April 1962 the Burien range was in financial difficulty, and consequently West Coast agreed to accept a 57% reduction in the range's rent during the late spring and summer months of 1962 (R. 193). On September 17, 1962, West Coast, in order to meet its cash needs, sold to a third party West Coast's contract under which it had leased archery equipment to the Burien range the previous year, together with its title to such equipment (R. 203). The

terms of the contract, however, gave the purchaser a right of recourse against West Coast (and Silver Buckle and its guarantor) for any future rent defaults on part of the lessee archery range. This right of recourse created a contingent liability of $130,560 against the two companies (R. 203).

A second range was opened in Denver in late September 1962 (R. 2648). By September 30, 1962, West Coast had incurred a cumulative deficit of $276,835 and a net loss of $203,063 for the first nine months of 1962 (R. 2745). Three additional ranges were opened in Portland, Oregon and in Downey and Covina, California in late 1962 (R. 204). But by December 31, 1962, West Coast's cumulative deficit had risen to $413,567 (R. 3004), indicating a net loss of $305,827 for the 10-month period March 1, 1962 - December 31, 1962.

West Coast continued to lose money during 1963 and 1964. As early as November 1962 and continuing through April 1964, Magnuson devoted a considerable amount of his time, skill and money to helping West Coast with its financial problems. On November 10, 1962, Magnuson inquired of Gay about the prospects of Golconda Mining Corporation ("Golconda") making an investment in West Coast (R. 254). (Magnuson was Golconda's vice president, a director, and its largest shareholder during 1962 and 1963. (R. 160, 2885-2907)) By December 1, 1962 it was agreed that Golconda, in exchange for options to purchase West Coast stock, would guarantee up to a maximum of $420,000 of any recourse obligations of West Coast (and of Silver Buckle, as guarantor) that might arise out of West Coast's sales of additional leases on archery equipment which West Coast was then manufacturing and leasing to new ranges (R. 254). To provide security for Golconda, West Coast agreed to pledge its nearly 2,000,000 shares of Silver Buckle stock to Golconda, and Silver Buckle agreed to pledge

to Golconda its portfolio of mining securities valued at about $69,000 and give Golconda a first lien on all of its mining properties including the Vindicator project (R. 254). Shortly thereafter, Magnuson and Golconda made various loans to West Coast totalling $70,000, in some cases receiving options to acquire West Coast stock in repayment (R. 240, 254, 263, 287). However, in order to meet its cash needs West Coast still found it necessary, on January 28, 1963, to sell the four leases on its equipment at the Denver, Portland, Downey and Covina ranges, as well as title to such equipment, to a third party for cash (R. 288). Again the terms of the sale gave the purchaser a right of recourse against West Coast (and Silver Buckle as guarantor), creating contingent liabilities of $851,000 (R. 288). At the time of this sale the Denver range was already in default on its rental payments to West Coast (R. 290).

Due to the gains arising from these lease sales, West Coast's deficit was reduced from $413,567 on December 31, 1962 (R. 3004) to $167,478 for the year ended February 28, 1963 (R. 3312). For that year, however, West Coast suffered a net loss of $59,736, notwithstanding the gains made on the lease sales (R. 3312).7/

During the first three months of 1963, Magnuson assisted West Coast in its efforts to obtain equity capital from major securities firms and other sources (R. 269, 285, 3272, 3282, 301-302, 306). All of these efforts were unsuccessful. Shortly before March 4, 1963 he conferred with Gay on this subject and at that time was told that all of the $770,000 which West Coast had obtained from the sale of its leases on January 28, 1963 had been spent (R. 301). By

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7/ West Coast sold all of its leases on its five existing ranges during the fiscal year ending February 28, 1963. West Coast had no further archery leases available for sale until October 23, 1963 when it sold its Redwood City lease for $164,000 shortly before the range opened, under terms which required West Coast to pay the purchaser the minimum monthly rental payments with credit for any payments received by the purchaser from the lessee (R. 384). Magnuson and Golconda guaranteed up to $60,000 of West Coast's $259,200 recourse obligations created by the sale of this lease (R. 384). This was the sixth (and last) lease sold by West Coast before it went out of business in the spring of 1964 (R. 414).

he end of March, Magnuson knew that West Coast's prospective archery equip-ent installations were bogging down and that West Coast would soon have real ash problems (R. 306). On March 25, 1963 Magnuson conferred with Gay about he possibility of merging Silver Buckle into West Coast (R. 305). Magnuson as fully aware at this time of West Coast's financial problems (R. 306).

In April 1963, Magnuson spent considerable time with West Coast officials rying to work out all the problems faced by the company (R. 310-311), and arrison knew during this month that Magnuson was attending high level West oast meetings (R. 309). By April 25, Magnuson knew the financial problems aced by the Denver, Portland, Downey and Covina ranges, including the fact iat some were behind in rental payments on their leases (R. 310). By the id of April the Downey range owed West Coast approximately $12,000 on open ccount and $4,212 in lease payments; the Covina range owed approximately $22,837 i open account and $4,681 in lease payments; and the Denver range owed approximate 2,500 on open account and $3,840 in lease payments (R. 317).[8/] The open count items for these ranges had been past due for the most part since about e end of 1962 (R. 317). The Burien range owed West Coast at this time proximately $11,564 which had accumulated since about May 10, 1962 without y payments having been made in the interim (R. 317).

Further consideration was being given to the possibility of a merger of lver Buckle and West Coast. About the middle of April 1963, Magnuson indi-ted that he would recommend that the board of directors of Golconda acquiesce

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8/ The archery ranges had not been making their lease payments to the purchaser of the leases, and therefore West Coast had been required to make the payments pursuant to the terms of the contracts of sale.

in such a merger. This acquiescence was on condition, however, that (1) Silver Buckle form a subsidiary (later named Silver Buckle Mines, Inc.) to hold all assets of Silver Buckle other than its West Coast stock and (2) all of the Silver Buckle Mines, Inc. stock be pledged to Golconda (R. 311).

These terms were agreed to and on May 3, 1963, Magnuson, Scott and Hull caused Silver Buckle Mines, Inc. to be incorporated (R. 322). Magnuson became an incorporator, stockholder and director of Silver Buckle Mines, Inc. (R. 2231). On May 24, 1963 Magnuson also became a director of West Coast and was instrumental in having two others elected as directors and in having one of them elected president (R. 331).

On June 10, 1963 the merger of Silver Buckle into West Coast took place with Silver Buckle stockholders becoming entitled to receive one share of West Coast stock for each five shares of their Silver Buckle stock (R. 331). This merger made Silver Buckle Mines, Inc. a wholly-owned subsidiary of West Coast (R. 336).

The financial condition of West Coast at this time was very serious. On June 11, 1963, Magnuson (who was now a director of the merged company) received a copy of West Coast's financial statements showing a loss in the month of May of $37,522, and showing a cumulative deficit on May 31, 1963 of $334,657 (R. 338).[9/] On June 26, 1963, Magnuson received a letter from the president of West Coast stating that the company's cash requirements through October for the production of archery equipment and the payment of "old accounts payable" were estimated to be $302,480, and that no further archery installations were anticipated during that time (R. 3572-3573). West Coast's financial statements as of

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9/ The fact that the deficit had been $167,478 on February 28, 1963 indicates that West Coast also lost money in March and April 1963.

June 30, 1963 showed total cash of only $33,836 (R. 3565), and a loss for that month of $31,000 (R. 345, 3566).

West Coast lost another $30,000 in July 1963 (R. 355), and had a deficit of $416,836 at the end of that month (R. 355). Magnuson was kept constantly aware of the growing financial crisis (R. 354).

By July 1963 the archery ranges were in desperate financial straits. The Covina range was losing money at the rate of $9,000 a month (R. 352). The Downey range had lost $43,416 for the six-month period of January 1 to June 30, 1963 (R. 353). The Portland range was over $140,000 in debt (R. 358). The Denver range lost $141,626 during the year ended August 31, 1963 (R. 3618). About September 16, 1963, West Coast discontinued its pro shop and rental stock business, and disposed of its entire stock of pro shop merchandise (R. 369)

During this time Magnuson and Golconda continued in their role as major creditors of West Coast. Both Magnuson and Golconda continued to make sizeable loans to West Coast during the latter part of 1963 (R. 364, 371, 379).

On October 4, 1963, West Coast sent Magnuson a letter concerning West Coast's financial problems (R. 376). This letter indicated that the Portland, Denver, Downey and Covina ranges owed West Coast a total of over $250,000 as of that date (R. 3625). As things continued to get worse for West Coast, Magnuson was kept fully informed (R. 389).

By early December 1963, West Coast considered going into Chapter XI bankruptcy proceedings (R. 401) and a special meeting of directors was called on January 13, 1964 to explore that possibility (R. 412). At this meeting it was agreed that West Coast should discontinue the archery business (R. 412).

On February 21, 1964, Magnuson, on the advice of his attorney, Hull, resigned as a director of West Coast because of conflicting interests

engendered by Magnuson's positions with other corporations (R. 416). Magnuson recommended that Robert N. Brown be elected as a director of West Coast to fill the vacancy caused by his resignation. Brown was so elected (R. 421).

By May 1, 1964, West Coast had dismissed all but three or four employees, was no longer engaged in manufacturing archery equipment, and was liquidating its machinery, supplies and office equipment (R. 422). At this time the archery ranges were either closed or in the process of closing down (R. 422).

C. Ruby Silver Mines, Inc.

About September 1961, Scott asked Magnuson if Pennaluna would underwrite a proposed Regulation A[10/] offering by Ruby Silver Mines, Inc. ("Ruby Silver"), a Silver Buckle subsidiary which had formerly been operated by Silver Buckle, New Park and East Utah as a joint venture. Shortly after this request, Magnuson became a director of Ruby Silver (R. 189). Ruby Silver's nine-man board of directors then included all of Silver Buckle's officers and its five directors--Scott, Wilson, Hull, Cranmer and Nolan Brown (R. 2454).

While Silver Buckle was acquiring an increasingly larger interest in West Coast during the spring of 1962, Ruby Silver's proposed Regulation A offering through Pennaluna was being prepared by H. J. Hull & Sons. On April 25, 1962 an underwriting contract between Pennaluna and Ruby Silver was executed by Scott on behalf of Ruby Silver, and by Harrison on behalf of Pennaluna after discussing the matter with Magnuson (R. 188). Shortly thereafter, on May 1, contracts were executed by Ruby Silver and its stockholders[11/] for the

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10/ Regulation A under the Securities Act of 1933, 17 CFR 230.251, et seq.

11/ These stockholders included Silver Buckle, New Park, East Utah, Scott, Magnuson, Hull, Nolan Brown, Wilson, Cranmer and Cranmer's son, Robert L. Cranmer (R. 190-191).

placing of their Ruby Silver stock in escrow in compliance with Regulation A requirements (R. 190-191).

D. Oil, Inc. Transaction

In December 1961, Cranmer announced that he would resign as president of the three companies which he controlled (New Park, East Utah and Oil, Inc.) to become the chairman of New Park's board of directors (R. 174). He intended to turn over the management of New Park and East Utah to Charles A. Steen, a "prominent entrepreneur" who had made a substantial investment in New Park stock (R. 174). Cranmer's son Robert was to manage Oil, Inc. (R. 174). At that time, Oil, Inc., New Park and East Utah each owned approximately 600,000 shares of Silver Buckle stock (R. 174).

During the early part of 1962, Steen was in the process of ousting the Cranmers from all three of the Utah-based companies. At the same time Steen indicated to Scott his disapproval of the management of Silver Buckle (R. 176). When Steen attempted to obtain control of Oil, Inc. (and the 600,555 shares of Si Buckle stock which Oil, Inc. owned), Scott arranged with the younger Cranmer for the sale of these shares to Scott at 10 cents per share (R. 176, 1982).[12/] Because Scott needed financial assistance in making the purchase, he contacted Magnuson, who agreed to help (R. 176, 1983).

Scott and Magnuson agreed that each of them would take what portion of the stock he could, and that they would try to get a few of their friends and relatives interested in the stock also (R. 1983-1984). Magnuson contacted Harris and at Magnuson's urging Harrison agreed that Pennaluna would purchase 100,000 shares of this block of 600,555 shares, even though it was not Pennaluna's usual

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12/ Contrary to petitioners' assertion (Br. 14) that Robert Cranmer initiated this transaction by contacting Scott, Scott testified that he did not remember whether Robert contacted him or he contacted Robert (R. 1982).

procedure to purchase such large blocks of stock (R. 570 , 181).

On May 8, 1962 Oil, Inc. carried out its commitment to Scott by authorizing its officers to accept an offer from Magnuson to purchase its 600,555 shares of Silver Buckle stock at a price of 10 cents per share for a total purchase price of $60,055.50. This stock was placed in escrow in a Wallace bank under an arrangement which enabled Magnuson to acquire these shares by delivering to the escrow agent a check drawn against his personal account in the amount of $60,055.50 (R. 2371-2374).

The result of the transaction as finally consummated was that Magnuson and accounts for his children (of which he was custodian) paid for 172,000 of the 600,555 shares, and Pennaluna, with the approval of Harrison, paid for 90,555 shares. The remaining shares were either paid for by Scott [13]/ or sold by Magnuson and Scott to others (R. 178-179).

E. Sales of Unregistered Securities

Pennaluna had completed resale of its block of 90,555 shares by July 14, 1962 at prices ranging from 13 cents to 20 cents per share (R. 182). These shares were sold by Pennaluna to various of its retail customers and to other broker-dealers (R. 2395-2397).

F. New Park-East Utah Transaction

By June 1962, Steen was in complete control of New Park and East Utah (R. 196, 197). On August 17, 1962, Steen once again expressed his displeasure at the way Silver Buckle was being managed and tried to unseat Scott as president of Silver Buckle (R. 196). Steen then caused New Park

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13/ Scott, Gay and Nolan Brown already owned a combined total of about 1 million shares of Silver Buckle stock (R. 1946).

and East Utah to start selling off their holdings in Silver Buckle in large blocks through a Salt Lake City brokerage house (R. 196).

Silver Buckle, acting as its own transfer agent, agreed to transfer these shares only after a legal opinion was provided by New Park's attorneys on August 24, 1962, which stated that in their opinion neither New Park nor East Utah was a control person of Silver Buckle (R. 196, 1439-1440).

Scott became deeply concerned about the depressing effect which these sales of large blocks of Silver Buckle stock by New Park and East Utah would have on the market price of the stock (R. 2013-2014, 2021). Scott was also concerned about Steen's refusal to approve Ruby Silver's proposed public offering through Pennaluna (R. 2022, 197). As a consequence, Scott and Hull began negotiating with Steen's attorney in an attempt to resolve their differences (R. 197). When these attempts failed, Scott asked Magnuson to try to resolve the situation (R. 197).

New Park and East Utah owned 1,167,111 shares of Silver Buckle stock, and Silver Buckle was willing to purchase only 367,111 of these shares. Steen let it be known that any settlement would be conditioned upon the sale, by New Park and East Utah, of the 800,000 shares of Silver Buckle stock which Silver Buckle itself was not willing to purchase (R. 2025). Magnuson agreed to acquire these 800,000 shares at 20 cents a share, with the understanding that Scott would take 300,000 of these shares, and that Pennaluna, with Harrison's approval, would purchase 200,000 of these shares (R. 199, 200).

On September 29, 1962 a plan of settlement was worked out at a meeting arranged by Magnuson. This plan called for two contracts, one between Silver Buckle, New Park and East Utah for 367,111 shares of Silver Buckle stock, and a contract between Magnuson, New Park and East Utah for 800,000 shares (R. 198). The Silver Buckle, New Park-East Utah agreement provided, among other things, that Sil

Buckle would cause Magnuson, Scott and Hull to transfer to New Park and East Utah their stock interests in Ruby Silver (R. 2595-2596). Of the 800,000 shares of Silver Buckle stock which Magnuson contracted to purchase from New Park and East Utah on September 29, 1962, a total of 200,000 shares were eventually paid for by Pennaluna, Scott paid Magnuson for 220,000 shares, Hull paid for 10,000 shares, and Magnuson paid for the remaining 370,000 shares (R. 199-201). With respect to Pennaluna's 200,000 shares, 100,000 shares were paid for by a Pennaluna check for $20,000 dated October 3, 1962 (R. 199).[14/]

G. Bidding and Trading - Manipulation of the Market

During the entire month of September 1962, just prior to the manipulation found by the Commission, the bid quotations in the Spokane sheets[15/] for Silver Buckle were in the range of 15 cents to 17-1/2 cents, and Pennaluna, which submitted quotations on 16 days, was high bidder on only 2 days, and was high together with other firms on only 4 other days, with these 6 days all in the first half of the month (R. 2442). In this month it purchased for its own account only 1,000 shares of Silver Buckle on the open market, and sold for its own account a total of only 15,000 shares (R. 2941-2944). Pennaluna's last quotations for the month were 16 cents bid, 20 cents asked, on September 27 (R. 2442).

14/ The remaining 100,000 shares were taken down by Pennaluna in November 1962 and January 1963 (R. 2402-2427).

15/ During the period under consideration Pennaluna and other Spokane dealers listed their inter-dealer bid and asked prices for local mining stocks, including Silver Buckle, in quotation sheets (the "Spokane sheets") that were used to make a composite quotation sheet distributed to the news media and to the Commission for each trading day (R. 209-210).

During the last 12 days of September 1962, immediately preceding Magnuson's negotiations with New Park and East Utah, Pennaluna made no purchases of Silver Buckle stock on the open market, and made only five sales totalling 6,000 shares sold at 17 to 18-1/2 cents per share to two dealers and two retail customers (R. 2399). In this same period it submitted to Spokane dealers low and intermediate bids coupled with intermediate offers (R. 2442). At the end of September Pennaluna had a "long" position in Silver Buckle stock of 13,005 shares (R. 208). On Friday, September 28, 1962, the last business day of the month, Silver Buckle shares were quoted by Spokane dealers at 17 cents bid, 20 cents asked, with Pennaluna submitting no quotations and making no purchases or sales (R. 2442).

The picture changed dramatically, however, as soon as Pennaluna became committed to acquire 200,000 shares of Silver Buckle stock by virtue of the New Park-East Utah transaction.

On Monday, October 1, 1962 (the first trading day after Magnuson executed the New Park-East Utah contract) Pennaluna purchased for its own account 11,500 shares of Silver Buckle stock from four Spokane dealers in seven transactions at prices ranging from 18-1/2 cents to 23 cents per share while making sales of 17,300 shares to 7 retail customers for its own account at prices ranging from 20 cents to 25 cents per share, with no sales to other dealers (R. 209, 2399).

On this same day, Pennaluna came back into the Spokane sheets for Silver Buckle stock with the high bid of 22 cents, 3 cents higher than the next highest bid, and with one of the two high ask quotations at 25 cents (R. 2442). For the week of October 1 to 5, 1962, Pennaluna was the high bidder on October 1, 3 and 4 (R. 2442). During that week Pennaluna purchased for its

account 46,300 shares of Silver Buckle stock at prices ranging from
1/2 cents to 26 cents a share and made sales for its own account of
200 shares of Silver Buckle stock at prices ranging from 20 cents to
cents a share (R. 2945-2952).

Of the 92 broker-dealers in various parts of the country who had
nsactions in Silver Buckle stock from September 1, 1962, through Decem-
4, 1962 (R. 253), Pennaluna made purchases totalling 46,300 shares for
own account during the business week of October 1-5, 1962, nine other
ker-dealers purchased a combined total of 22,700 shares that week, and
remaining 82 broker-dealers made no purchases (R. 2945-2952).

For the week of October 8 to 12, 1962, Pennaluna was the high
der in the Spokane sheets on four days and one of the high bidders on
other day (R. 2442). During that week Pennaluna purchased for its
account 52,000 shares of Silver Buckle stock at prices ranging from
cents to 29 cents a share and sold for its own account 47,405 shares
Silver Buckle stock at prices ranging from 24 cents to 30 cents per
re (R. 2953-2961). Only ten of the remaining 91 dealers purchased any
ver Buckle for their own account. Their purchases totaled 53,113
res (R. 2953-2961).

For the week of October 15-19, 1962, Pennaluna was the high bidder on
ur days (R. 2442). For that week Pennaluna purchased for its own account
,000 shares of Silver Buckle stock at prices of 25 cents to 30 cents a share
d sold for its own account 25,400 shares of Silver Buckle stock at prices
nging from 29 cents to 31 cents a share (2961-2966). Only seven of the remaining
dealers purchased any Silver Buckle for their own account. Their purchases
taled 29,500 shares (R. 2961-2966).

For the week of October 22-26, 1962, Pennaluna was the high bidder on
l five days (R. 2442). For that week Pennaluna purchased for its own account

15,000 shares of Silver Buckle stock at prices ranging from 20 cents to 30 cents per share and sold for its own account 24,100 shares of Silver Buckle stock at prices ranging from 26 cents to 29-1/2 cents per share (R. 2967-2975). Only 14 of the remaining 91 dealers made any purchases for their own account. Their purchases totaled 98,900 shares, most of which were purchased by these 14 dealers on October 26, 1962 (R. 2967-2975), the day Harrison predicted that Silver Buckle was "headed for $1" (p. 25, infra).

In the succeeding weeks Pennaluna continued its bidding and trading activities in the same fashion.

On the basis of the trading information with respect to Pennaluna and the other 91 broker-dealers for the period September 1, 1962 to December 4, 1962, Pennaluna, as one of the 32 most active broker-dealers in Silver Buckle stock, made all of its purchases and sales for its own account, involving a total of 532,600 shares purchased and 562,205 shares sold (R. 2938). This volume of trading was equivalent to 41,97 per cent of the combined purchases by the 32 dealers for their own accounts, and 39.62 per cent of their combined sales (R. 2938-2940). The total trades, as dealer, by these 32 broker-dealers involved a total of 2,687,836 shares of which Pennaluna was a buyer or seller of 1,094,805 shares, or 40.73 per cent of the total trading volume (R. 2936-940).

For the month of December 1962, Pennaluna's trading ledger shows that t purchased for its own account 282,500 shares of Silver Buckle stock. Of these, 0,000 had been acquired in the New Park-East Utah transaction but Pennaluna had ailed to record them previously (R. 2410-2417). During the month its sales for ts own account amounted to 259,100 shares at prices ranging from 60 cents to $1.02 er share (R. 2410-2417).

During the period October 1, 1962 to January 8, 1963, Pennaluna submitted bids on all but two trading days. Out of 56 days on which Pennaluna and at least one other firm submitted bids, Pennaluna was the high bidder on 34 days, and on 13 days its bid was equal to the high. On 7 additional days Pennaluna was the only bidder (R. 2442-2443). By January 8, 1963 the price of Silver Buckle stock reached a high of $1.40 per share, a rise of 700 per cent in just over three months (R. 2447).

For the period from January 1, 1963 to July 2, 1963, Pennaluna purchased 628,613 shares for its own account, and sold for its own account 547,640 shares, leaving it with a "long" position of 47,373 shares which were converted into West Coast stock as a result of the June 10, 1963 merger between those companies (R. 2417-2437). During this period Pennaluna was either the high bidder for Silver Buckle stock in the Spokane sheets or one of the high bidders with one or more other dealers on 98 of 108 business days for which bids were submitted, and was the high or only bidder on 87 of these days (R. 2443-2447).

The highest bids submitted in the Spokane sheets during the entire period from October 1, 1962 to the end of the bidding for Silver Buckle stock on June 10, 1963 were the two $1.40 bids submitted by Pennaluna and L. E. Nichols Co. [16] on January 8, 1963, after a nearly steady rise from October 1 (R. 2442-2447)

16/ L. E. Nichols & Co. had occupied offices for the preceding 15 years in rooms adjoining Pennaluna's Spokane office (R. 210).

17/ See graph at R. 1892.

H. Teletype Conversations - Misrepresentations

During the period that Pennaluna was actively bidding and trading Silver Buckle stock, Harrison engaged in a number of teletype conversations with various broker-dealers around the country. On Monday, October 1, 1962, the first business day after Magnuson had executed the New Park-East Utah contract, Harrison engaged in a teletype conversation with May & Co., a New York City broker-dealer who had traded in Silver Buckle stock in the past with Pennaluna. In response to the question, ". . . [W]hat goes . . .?", Harrison quoted a price of 19 cents a share for 5,000 shares of Silver Buckle and then said, "Steen's attorney here Saturday and a deal signed up so [there] will be no more Salt Lake stock available . . ." (R. 211, 2663). Harrison did not tell May & Co. that in fact 200,000 shares of "Salt Lake stock" had been acquired by Pennaluna, who was planning to sell it over-the-counter.

Harrison continued to "sell" Silver Buckle in these teletype messages, while at the same time indicating that he was in control of the Silver Buckle market. In a message of October 4, 1962, Harrison said, "This Silver Buckle will be the big one out here and all over the country soon. . . . It's 23-25 and will be 65 one of these days, so don't get caught on it. . . . Don't want [the] market up right now. Certain deals being signed between company and Steen, etc., but it will take off. It's [a] terrific deal . . . orders coming in for that archery stuff from all over world" (R. 214, 2737).

The statement that Harrison did "not want the market up right now" was due to the fact that the rise in the price of Silver Buckle stock immediately after the signing of the New Park-East Utah contracts on September 29, 1962 caused embarrassment to the officials of New Park and East Utah who had just sold 800,000 shares at 20 cents a share (R. 214). It was feared that New Park and East Utah might not go through with the deal (R. 214). Therefore, Harrison

ontrived to keep the price of Silver Buckle down until the transaction was onsummated. This can be seen by reference to a teletype conversation arrison had with May & Co. on October 19, 1962. In response to the uestion, "What is making Silver Buckle easier . . .?", Harrison replied, Salt Lake wants a low quote on it to justify their sale to Silver Buckle -- o accommodating them -- won't last long, couple of days is all . . ." R. 228, 2865). By October 26, 1962 Harrison felt free to tell May & Co. hat "Silver Buckle headed for $1" (R. 238), and about November 10, 1962, arrison, replying to an inquiry from E. E. Smith & Co. (a broker-dealer), said, The big deal here is Silver Buckle. It is going to sell much higher. Archery usiness deal taking over like wildfire" (R. 242).

On December 10, 1962, May & Co., referring to the New Park-East Utah ransaction, asked Harrison by teletype: ". . . East Utah and New Park had 1,200,000 shares [of Silver Buckle]. Silver Buckle got 367,000. Where did the balance go?" Harrison replied, ". . . the balance was bought by Dr. Scott and associates and a bank and is not for sale and is off the market." May & Co. replied, "That what I wanted to know. That stock cannot be sold" (R. 2990). In fact, 200,000 shares were very much on the market and being sold by Pennaluna. At no time did Harrison disclose to May & Co. or any other broker-dealer that Pennaluna had directly or indirectly acquired a block of Silver Buckle stock from New Park or East Utah (R. 257).

On February 8, 1963, in response to an inquiry from May & Co., "Are the West Coast people showing a profit each month?", Harrison replied, "Yes, and getting better every day -- every time they open up one [of] those deals it's like making a new rich strike in a mine" (R. 295, 3280). On March 18, 1963, In a teletype conversation with May & Co., Harrison predicted that the price of Silver Buckle would hit $2 before the end of the year (R. 303). And on March 21, 1963, Harrison told another broker-dealer not to "get caught short" (R. 303).

Petitioners concede (R. 607, 214-215) (Br. 34, 67-69) that Harrison's statements and price predictions with regard to Silver Buckle and West Coast were made without the benefit of any current financial information concerning either of these companies.

I. Additional Sales of Unregistered Securities

By December 4, 1962 the price of Silver Buckle had been driven up to 80 cents a share (R. 2411, 2443). Profiting from the price rise, Pennaluna had, by this date, sold to retail customers and other broker-dealers 100,000 of the 200,000 shares of Silver Buckle which it had acquired by virtue of the New Park-East Utah transaction (R. 2402-2411).

Magnuson was also selling Silver Buckle stock during 1962 and 1963. Bet July 1962 and June 1963 Magnuson for his own account and as custodian for his children sold about 238,500 shares of Silver Buckle to persons and broker-dealer other than Pennaluna (R. 425-429). Of these shares all but 3,500 were sold aft the price of Silver Buckle began its spectacular climb in October 1962 (R. 425).. Between November 9, 1962 and December 24, 1962, Magnuson sold 52,500 of the 55,000 shares of Silver Buckle he had acquired as custodian for his children in the Oil, Inc. transaction, at prices ranging from 22 cents to 80 cents per share (the other 2,500 shares having been sold previously) (R. 425). In the same fashion he sold the 117,000 shares of Silver Buckle he had acquired in his own name in the Oil, Inc. transaction, mostly to other dealers over a period extending from about September 30, 1962 to about May 22, 1963, at prices ranging from 20 cents to $1.40 per share (R. 425-428). The remaining 66,500 shares of Silver Buckle which Magnuson sold between July 1962 and June 1963 were shares which Magnuson had purchased in a number of other transactions (R.42 At least some of these 238,500 shares were resold by the broker-dealer purchasers

to public investors (R. 235-237, 239, 425-429).

J. O'Brien Transactions -- Further Sales of Unregistered Securities

In view of the sudden and spectacular rise in the price of Silver Buckle stock, the Commission began an investigation of the matter. Pennaluna first became aware of this investigation about December 5, 1962 (R. 253).

Representatives of the Commission's Seattle Regional Office conferred with Magnuson on January 10, 1963 concerning the Commission's investigation of Silver Buckle stock (R. 275). In the course of this discussion Magnuson assured these representatives that he did not intend to sell any more of the stock acquired in the New Park-East Utah transaction until the matter with the Commission was cleared up (R. 278-279). At about this time he told Harrison the substance of his discussion with the Commission's representatives, and Pennaluna's remaining 100,000 shares of the stock which it had acquired in the New Park-East Utah transaction were charged to the personal drawing accounts of Harrison and Magnuson in proportion to their interests in the firm. The certificates for these shares were then placed in an envelope marked "Special Transactions," and the envelope was placed in a safety deposit box in a Wallace bank (R. 278-279).

On March 5, 1963, Scott sent a letter to Harrison and other dealers concerning the Commission's investigation of Silver Buckle stock (R. 302). The letter indicated that the Silver Buckle shares bought by the individual purchasers[18/] in the New Park-East Utah transaction might be subject to registration under the Securities Act before they could be sold (R. 3319).

18/ As opposed to the shares bought by Silver Buckle itself in that transaction.

In spite of Magnuson's assurances to the Commission's representatives on January 10, 1963 that no more of the Silver Buckle stock which had been acquired in the New Park-East Utah transaction would be sold until the matter with the Commission had been cleared up, and notwithstanding the implied warning on this same subject set forth in Scott's letter of March 5, 1963 to Harrison, on May 2, 1963 Magnuson and Harrison started selling off the 100,000 shares of Silver Buckle stock which they had placed in the "Special Transactions" envelope four months earlier (R. 319-320). Their sales of this stock were made to Pennaluna in 12 transactions spread over a period continuing to June 18, 1963, at prices ranging from 55 cents to 61 cents per share. These sales were made to Pennaluna through the account of Jerry T. O'Brien, Harrison's cousin (R. 137), in amounts of 5,000 and 10,000 shares (R. 319-320). Pennaluna would send a check to O'Brien, who would deposit it in his personal account and then issue his personal check to Magnuson for the full amount of the proceeds, less 1/2 cent per share (R. 320). Magnuson and Harrison shared the proceeds from these sales according to their proportionate partnership interests (R. 320).

Pennaluna resold these 100,000 shares to certain of its retail customers and to other broker-dealers over a period extending to about July 11, 1963, after more than 30,000 shares had been converted into West Coast stock (R. 319, 2434-2437, 3717-3720). Prior to and during Pennaluna's purchase and resale of these shares neither Pennaluna, Harrison, Magnuson nor any person representing them contacted any representative of the Commission's staff to ascertain whether the question of Magnuson's control position with respect to Silver Buckle had been resolved or to inquire whether the 100,000 shares or any portion thereof could be freely traded (R. 320).

K. West Coast Transaction -- Further Sales of Unregistered Securities

In September 1963 Pennaluna purchased, from Magnuson and from the

custodian accounts for Magnuson's children, 5,250 shares of West Coast stock which had been acquired from West Coast in December 1962. Pennaluna then resold 750 of these shares (R. 424, 430).

.. Magnuson's Sales of West Coast Stock -- Failure to Disclose Material Information

At least by the summer of 1963 it was apparent that West Coast was in desperate financial circumstances (see pp. 13-14, supra). Notwithstanding this fact, the image being created for the public was that of a highly promising enterprise enjoying considerable success in the field of automated archery lanes -- and Magnuson himself contributed to furthering that image.

From January 1962 and continuing through September 1963, "Mining Hi Lites" published more than 30 articles which pictured West Coast as a company enjoying continued success in the field of automated archery lanes (R. 743-777).

In early July 1963, Magnuson was in contact with North's Financial Publications of San Francisco and provided the publisher with a copy of West Coast's annual report (R. 358-359).[19/] The August 15, 1963 edition of this publisher's newsletter was entitled, "PIONEER AND LEADER IN RAPIDLY GROWING FIELD OF AUTOMATED INDOOR ARCHERY, WITH PROMISING SILVER PROPERTIES," and went on to state, among other things, that West Coast-equipped archery ranges were enjoying a steady rise in business, that West Coast had an excellent sales backlog (4-5 million dollars) and prospects, and that it would take many years of rapidly expanding sales for West Coast to come close to filling its share of

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19/ This annual report contained a report by West Coast's president that the company had experienced "a healthy corporate growth," that $5,000,000 of orders had been accepted, and that additional archery installations were to be made in eight states (R. 3290). These statements were published in various newspaper articles in the spring of 1963 (R. 3321; West Coast scrapbook, Vol. II, p. 22).

the potential market (R. 3602). The publication was cited in "Mining Hi Lites" for the week ending August 23, 1963 (R. 363).

On July 19, 1963, at Magnuson's request, Gay sent financial information and literature concerning West Coast to Richard Madden, a representative of a San Francisco securities firm which later (about August 16, 1963) proposed to inventory West Coast stock and make a market in it (R. 353). Magnuson informed Madden by letter on September 4, 1963 that he thought West Coast was "one of those rare situations that could be very profitable" and "could be an extremely fine vehicle, not only for the archery business, but for other types of recreational endeavor" (R. 366).

Although Magnuson, a director and controlling person of West Coast, knew that the company's favorable public image was far different from the company's actual condition, he sold 24,101 shares of West Coast stock to persons other than Pennaluna during the period August 1963 through December 1963 (R. 430) admittedly never disclosing to the buyers of these securities any information he then knew concerning West Coast's serious financial condition (R. 431).

M. Violations

1. Registration Provisions

The Commission found that Magnuson was "a member of a control group in Silver Buckle, if not himself actually in control"; that therefore Pennaluna's sales of the 90,555 Silver Buckle shares acquired in the Oil, Inc. transaction and Pennaluna's sales of the first 100,000 shares of Silver Buckle stock acquired in the New Park-East Utah transaction were made "for or on behalf of a controlling person of the issuer"; and that, accordingly, Pennaluna was an "underwriter" withi the meaning of Section 2(11) of the Securities Act and the sales of these unregistered shares violated the registration provisions of that Act (R. 4612-4613

Q/ Petitioners admit that none of the Silver Buckle or West Coast shares involved this proceeding were reigstered with the Commission under the Securities Act (R. 432).

The Commission further found that, in view of Magnuson's controlling position in Silver Buckle and West Coast, Pennaluna was an underwriter with regard to the 37,500 Silver Buckle shares it purchased from Magnuson in the O'Brien transactions and the 750 West Coast shares it purchased from him in the West Coast transaction, and that therefore the sale of these unregistered shares by Pennaluna violated the registration provisions (R. 4612-4613).

With respect to the responsibility of Harrison, who, as Pennaluna's trader, effected the sales of unregistered securities for Pennaluna, the Commission found that he "was aware of facts which put him on notice that distributions of control stock might be involved" (R. 4613).

The Commission further found that the transactions in which Magnuson sold unregistered shares of Silver Buckle stock to broker-dealers other than Pennaluna, who resold these shares to the public, also violated the registration provisions (R. 4613).

Accordingly, the Commission held that Pennaluna, Magnuson and Harrison willfully violated the registration provisions of the Securities Act (R. 4613).

2. Antifraud and Anti-manipulation Provisions

The Commission found that Harrison made false and misleading statements in his teletype conversations with other broker-dealers, in violation of the antifraud provisions of the Securities Act and the Exchange Act (R. 4615-4617, 4619)

The Commission also found that "Pennaluna's bidding and trading in the stock [of Silver Buckle] and its obvious motive for raising the price level, coupled with [the] misrepresentations by Harrison to other dealers relating to the Silver Buckle stock and bullish predictions as to its future market price . . . make it clear that Pennaluna and Harrison engaged in a manipulative scheme in the sale of that stock," in violation of the antifraud provisions (R. 4614, 4619).

With respect to the responsibility of Magnuson for this manipulative and fraudulent conduct, the Commission found that "as an active major partner [in Pennaluna] he had a duty to know of the nature and scope of the firm's activities, and being chargeable with knowledge, he must be held to have at least a shared responsibility for the violations which occurred" (R. 4617).

The Commission further found that Magnuson's sales of West Coast stock during the period August through December 1963, without disclosure of the information he knew about West Coast's serious financial condition, also constituted violations of the antifraud provisions (R. 4617-4619).

Finally, the Commission found that Pennaluna, in contravention of Rule 10b-6, bid for and purchased Silver Buckle and West Coast stock during the periods Pennaluna and Magnuson were distributing their shares (R. 4619).

Accordingly, the Commission held that Pennaluna, Harrison and Magnuson willfully violated the antifraud and anti-manipulation provisions of the Securities Act and the Exchange Act (R. 4619).

3. Other Violations

In addition to the foregoing violations, petitioners stipulated (R. 433-441), the Commission found (R. 4620-4621) and petitioners admit in their brief (Br. 78) that Pennaluna, aided and abetted by Magnuson and Harrison, willfully violated Sections 7, 10(a), 15(c)(1) and 17(a) of the Exchange Act, 15 U.S.C. 78g 78j(a), 78o(c)(1), 78q(a); Rules 10a-1, 15c1-5, 17a-3 and 17a-4 thereunder, 17 CFR 240.10a-1, 15c1-5, 17a-3, 17a-4; and Section 4(c)(2) (12 CFR 220.4(c)(2)) of Regulation T promulgated by the Board of Governors of the Federal Reserve System. These violations consisted of: (a) failure to liquidate purchases of securities in customers' accounts, as required by Section 4(c)(2) of Regulation T (b) executing sell orders which were not marked either "long" or "short," as

required by Rule 10a-1; (c) failure to disclose control as required by Rule 15c1-5; (d) failure to make and keep current certain records, as required under Rule 17a-3; and (e) failure to preserve originals of all communications received and copies of all communications sent, as required by Rule 17a-4.[21/]

SUMMARY OF ARGUMENT

There is substantial evidence to support the Commission's findings that Magnuson was a controlling person of Silver Buckle and West Coast throughout the entire period that the stock of those companies was being distributed, and that Harrison knew or should have known that distributions of control stock were taking place. The Commission properly placed the burden on the petitioners to prove their claim that the sales of that stock were exempt from the registration provisions of the Securities Act.

There was also substantial evidence to support the finding that Harrison, Magnuson and Pennaluna willfully violated the antifraud and anti-manipulation provisions of the securities laws by making false and misleading statements concerning the price of Silver Buckle stock, the desirability of West Coast as an investment and West Coast's financial condition, by manipulating the market in Silver Buckle stock, and by bidding for and purchasing such stock while engaged in its distribution. The finding that Magnuson further violated the antifraud provisions by selling West Coast stock without disclosing material information known to him by virtue of his position as an insider of that company is also supported by substantial evidence. The Commission was correct in requiring only a preponderance of the evidence to prove the fraud violations.

The sanctions imposed by the Commission were well within its discretionary authority, and petitioners' objections to the conduct of the Commission's staff are untimely and in any event are without merit.

21/ Petitioners have admitted the use of the requisite jurisdictional means in connection with all of their activities involved herein (R. 130-132; R. 432-435; R. 437-439; R. 441).

ARGUMENT

Section 25(a) of the Exchange Act, which confers jurisdiction on this Court, provides that "the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Accord, Section 10(e)(B)(5) of the Administrative Procedure Act, now codified as 5 U.S.C. 706(2)(E).

The courts have consistently held that an administrative agency's findings of fact are presumed to be supported by substantial evidence and that a petitioner who challenges those findings must specifically designate those findings for which he claims that there is no substantial evidence.[22/] Under the standard of substantial evidence the Commission has the responsibility both of resolving conflicts in the evidence and of drawing necessary inferences from the record.[23/] The reviewing court is not to determine where the weight of the evidence lies. Its function is limited to determining whether there was, in fact, substantial evidence to support the Commission's findings.[24/] As the Supreme Court said in Rochester Telephone Corp. v. United States, 307 U.S. 125, 147 (1939):

> Having found that the record permitted the Commission [Communications Commission] to draw the conclusion that it did, the court travels beyond its province to express concurrence therewith as an original question. The judicial function is exhausted when there is found to be a rational basis for the conclusion of the administrative body.

22/ Keele Hair & Scalp Specialists, Inc. v. Federal Trade Commission, 275 F.2d 18, 21 (C.A. 5, 1960); Steelco Stainless Steel, Inc. v. Federal Trade Commission, 187 F.2d 693, 694-695 (C.A. 7, 1951).

23/ National Labor Relations Board v. Marcus Trucking Co., 286 F.2d 583, 591-592 (C.A. 2, 1961); Standard Distributors, Inc. v. Federal Trade Commission, 211 F.2d 7, 12 (C.A. 2, 1954); Archer v. Securities and Exchange Commission, 133 F.2d 795, 799 (C.A.8), certiorari denied, 319 U.S. 767 (1943); Hartford Gas Co. v. Securities and Exchange Commission, 129 F.2d 794, 796 (C.A. 2, 1942).

24/ Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-620 (1966); Wright v. Securities and Exchange Commission, 112 F.2d 89, 94 (C.A. 2, 1940).

I. THE COMMISSION'S FINDING THAT PETITIONERS WILLFULLY VIOLATED THE REGISTRATION PROVISIONS OF THE SECURITIES ACT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. One Who Claims an Exemption from the Registration Provisions of the Securities Act Has the Burden of Proving that the Exemption Is Applicable.

Since the Securities Act is a remedial statute, it has long been the rule that the terms of an exemption from the Act are strictly construed against the claimant of its benefit.[25/] And, as the petitioners concede (Br. 48), it has long been the rule that the claimant of an exemption bears the burden of proving that the exemption is in fact applicable in his particular case. Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119 (1953).[26/]

Notwithstanding the long line of authorities in support of these principles, petitioners now ask this Court to "clarify" the holding of the Supreme Court in Ralston Purina, and hold that in the instant case the burden was upon the Commission's Division of Trading and Markets ("Division") to prove that the 4(1) and 4(3) exemptions were not applicable to the transactions in question. Petitioners assert that such a rule is dictated by Section 7(d) of the Administrative Procedure Act, now codified as 5 U.S.C. 556(d), which provides, in pertinent part: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Petitioners assert that any other rule would constitute an "abuse of administrative due process of law" (Br. 48).

25/ Securities and Exchange Commission v. Joiner Leasing Corp., 320 U.S. 344, 353, 355 (1943); Securities and Exchange Commission v. Sunbeam Gold Mines Co., 95 F.2d 699 (C.A. 9, 1938); cf. Black v. Magnolia Liquor Co., 355 U.S. 24, 26 (1957).

26/ Accord, Greater Iowa Corp. v. McLendon, 378 F.2d 783, 790 (C.A. 8, 1967); Securities and Exchange Commission v. Van Horn, 371 F.2d 181, 187 (C.A. 7, 1966); United States v. Tehan, 365 F.2d 191, 196 (C.A. 6, 1966); Capital Funds, Inc. v. Securities and Exchange Commission, 348 F.2d 582, 586 (C.A. 8, 1965); Prudential Insurance Company of America v. Securities and Exchange Commission, 326 F.2d 383, 386 (C.A. 3, 1964); Securities and Exchange Commission v. Culpepper, 270 F.2d 241, 246 (C.A. 2, 1959).

Section 7(d) of the APA was not intended to disturb the traditional allocation of the burden of proof between parties to an adjudicative proceeding. This is evidenced by that section's opening clause, which reads, "Except as otherwise provided by statute . . . ." 27/ Petitioners admit that the Securities Act has been construed by the Supreme Court to require that the person claiming an exemption, rather than the Commission, have the burden of proving that the exemption is applicable. Ralston Purina, supra. Hence the Securities Act falls squarely within the exception provided in Section 7(d).

Petitioners agree that to place the burden of proof upon the claimant in the case of a distribution from an issuer is "consistent with administrative due process" (Br. 48). But they argue that to place this burden on the claimant when the distribution emanates from a controlling person of the issuer violates due process (Br. 48). Petitioners' theory for distinguishing in this manner between issuers and controlling persons is unclear, and no authority is cited for their novel proposition that such a distinction should be drawn. On the contrary, the House Committee Report on the Securities Act stated that one of the functions of the last sentence of the definition of underwriter, defining "issuer" to include not only the issuer but also persons controlling the issuer, was:

> . . . to bring within the provisions of the bill redistributions whether of outstanding issues or issues sold subsequently to the enactment of the bill. . . . Such a public offering may possess all the dangers attendant upon a new offering of securities. . . . 28/

Hence, in the instant case Section 7(d) required only that the Division have the burden of proving that the mails or the facilities of interstate commerce had been used to sell securities which were not registered under the Securities Act. The burden then shifted to petitioners to prove that the transactions involved were exempt from registration. Cf. Edwards v. United States, 312 U.S. 473,

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27/ And see, National Labor Relations Board v. Mastro Plastics Corp., 354 F.2d 170 (C.A. 2), certiorari denied, 384 U.S. 972 (1965).

28/ H. Rep. No. 85, 73d Cong., 1st Sess. (1933), p. 13.

482-483 (1941), where the Supreme Court upheld a conspiracy indictment under the Securities Act charging the sale of unregistered securities against an attack that the indictment failed to charge that the securities sold were not exempt from registration. We submit that, in view of the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on a person who would plead the exemption is both fair and reasonable.

Lastly, petitioners argue that administrative due process was violated because (1) petitioners did not know the theory the Division was using in regard to the issue of control (Br. 49-50), and because (2) the Commission concluded that Magnuson was a control person, "a contention not raised by the Division and therefore not directly dealt with by petitioners" (Br. 50).

It should be pointed out initially, with respect to these arguments, that petitioners stipulated they received due and adequate notice of the issues to be determined in this matter (R. 132). In addition, the facts showed, and petitioners argued strenuously (R. 3999-4007), that the only persons involved whose control status was in question were Magnuson, Oil, Inc., New Park and East Utah. All the petitioners had to show to prove their exemption was that none of these people were in control of Silver Buckle during the period in question.

The Commission found that Magnuson was a controlling person of Silver Buckle (R. 4612). The question of Magnuson's control was argued extensively before the Commission in the brief filed by the Division (R. 3917-3928) and in the brief filed by the petitioners (R. 4007-4021).

B. Magnuson was A Controlling Person of Silver Buckle and of West Coast.

Petitioners admit (Br. 57, 58, 74) that the sale of West Coast stock by Pennaluna was a violation of the Securities Act.[29/]

As to the other transactions, petitioners argue that the "whole record" does not support the Commission's finding that Magnuson was a controlling person, and they further argue that the Commission failed to make "specific, responsible findings" (Br. 51-52).

Contrary to petitioners' assertions, the Commission was careful to set forth its findings with great care, and after a review of the whole record (R. 4609), the Commission stated that " . . . Magnuson and Scott were in effectiv control of Silver Buckle . . ." (R. 4612). The Commission also found that Magnuso was a controlling person of West Coast (R. 4613). The Commission went on to stat specifically its reasons for these findings (R. 4612; p.42, infra). There is substantial evidence to support the Commission's decision.

1. A finding of control depends upon the circumstances found in each particular case.

The Commission, in Rule 405 under the Securities Act, 17 CFR 230.405, has defined "control" to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." This definition is a reflection of the view expressed in the House Committee Report on the Securities Act that

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29/ Petitioners' argument that a Section 4(4) exemption would have been available had this transaction been handled in another manner is not properly before the Court. Petitioners never raised the Section 4(4) argument before the Commission, and Section 25(a) of the Exchange Act provides, in part, that "no objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission." See note 38, infra. In any event petitioners have the burden of proving this exemption, and they have not shown that they met the 1% test, that there were no solicitations, or that Magnuson (Pennaluna's principal) was not an underwriter. See Rule 154 under the Securities Act, 17 CFR 230. 154.

> [t]he concept of control herein involved is not a narrow one, depending upon a mathematical formula of 51% of voting power, but is broadly defined to permit the provisions of the Act to become effective wherever the fact of control actually exists. 30/

The Communications Act of 1934 uses the identical control language which is found in the Securities Act definition of the term underwriter. 31/ The Supreme Court, in discussing the meaning of control as used in Section 2(b) of the Communications Act, set forth what has now become a well-settled principal in administrative adjudication of the issue of control:

> Investing the Commission [Federal Communications Commission] with the duty of ascertaining "control" of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. 32/

Control, the Commission has held under the Securities Act, "is not synonymous with direct operation of an enterprise"; it "may be inferred from the conduct of the parties." 33/ It follows that control can rest with a group

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30/ H. Rep. No. 85, 73d Cong., 1st Sess. (1933), p. 13, and see Stadia Oil & Uranium Co. v. Wheelis, 251 F.2d 269, 275 (C. A. 10, 1957).

31/ Section 2(b) of the Communications Act of 1934, 47 U.S.C. §152(b).

32/ Rochester Telephone Corp. v. United States, 307 U.S. 125, 145 (1939).

33/ Reiter-Foster Oil Corp., 6 S.E.C. 1028, 1044 (1940). And see Securities and Exchange Commission v. Franklin Atlas Corp., 154 F.Supp. 395 (S.D. N.Y., 1957) where the manager of a real estate venture who was neither a director, officer nor stockholder was found to be "in control" for purposes of Section 2(11) of the Securities Act.

of persons, such as the members of the corporation's management (both directors and officers), or a number of business associates.[34/]

2. The Control Factors in the Instant Case

Magnuson's association with Scott and Silver Buckle goes back to at least 1950, when Magnuson's accounting firm did some work for Silver Buckle (R. 157). Scott and Gay, in turn, had securities accounts at Pennaluna (R. 3009-3010). In addition Hull, one of the three Wallace residents on Silver Buckle's board of directors, was Magnuson's personal attorney, as well as legal counsel for Pennaluna, legal counsel for Silver Buckle, and secretary and a director of Silver Buckle.[35/] It should also be noted that when West Coast's president went in search of funds in the early fall of 1961, it was Magnuson who was initially contacted (R. 166).

Magnuson and the three Wallace directors were involved in various corporate endeavors together. These business interrelationships are set forth in a table found at page 2231 of the record. One of the most important of these interrelationships was that involving Vindicator Silver-Lead Mining Company.

As previously stated (p. 7, supra), one of Silver Buckle's principal assets was a 50% working interest in Vindicator's mining claims. Magnuson was the vice president and a director of Vindicator (R. 160). Scott was also a director of Vindicator (160). Two of the other three directors of Vindicator were August Voltolini, a business partner of Magnuson, and S. K. Garrett, an incorporator of West Coast and one of its first directors (R. 160). S. K. Garrett was the brother-in-law of Bryan Dickinson, and

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34/ II Loss, Securities Regulation 779 (2d ed. 1961) and cases there cited.

35/ Common counsel is one indication of control. J. P. Morgan & Co., Inc., 10 S.E.C. 119 (1941).

Dickinson was the incorporator, president and a director of West Coast (R. 165). One of the certified public accountants employed by Magnuson's accounting firm was the secretary of Vindicator (R. 160).

Vindicator's mining claims adjoined those of the Lucky Friday Silver-Lead Mining Co. ("Lucky Friday") (R. 161). Magnuson was a vice president and director of Lucky Friday (R. 161). The two largest stockholders in Lucky Friday were the Hecla Mining Company and Golconda Mining Company (R. 175). Magnuson was a director of Hecla and Magnuson's accounting partner was the president and a director of Hecla (R. 175). Magnuson was also the largest shareholder of Golconda and was a controlling person of that company (p. 10, supra).

From 1961 on, the management of Vindicator had been negotiating with the management of Lucky Friday in regard to the development of Vindicator's properties from the bottom of the Lucky Friday mine (R. 161). Since Vindicator was a principal asset of Silver Buckle, any increase in the worth of Vindicator would inure to be the benefit of Silver Buckle. Hence, even though Magnuson did not take part in the actual negotiations between Vindicator and Lucky Friday (R. 161), his position with respect to these companies could reasonably be taken into account by the Commission on the question of Magnuson's influence on Silver Buckle's affairs.

It was with these facts as a background that the Commission examined the transactions involved herein, commencing with the Oil, Inc. transaction in May 1962. It should be remembered that Magnuson's influence in Silver Buckle was exerted through Scott and the other Wallace directors. Had Steen been successful in ousting Scott from his position in Silver Buckle, Magnuson's influence in that company would have been lost. Additionally, by the time of the New Park transaction in September 1962, Scott, Magnuson and

the custodian accounts for Magnuson's children owned substantial amounts of Silver Buckle stock, and Steen was depressing the price of these shares through sales of large blocks of stock through a Salt Lake City brokerage house.

The Commission found that Magnuson provided the assistance Scott needed to buy up the Silver Buckle stock controlled by Steen, that he provided assistance in seeing to it that large blocks of these shares were acquired by people friendly to Scott (including Magnuson himself, his children's custodian accounts and Pennaluna) and that he provided assistance in disposing of the remainder of the shares to new owners who would not pose the threat to the market indicated by Steen. It thus appears that when Scott, who was concededly a controlling person of Silver Buckle, became concerned with the threat to his status posed by Steen, he turned to Magnuson, and Scott and Magnuson thereafter became allied in repelling Steen and, in the process, in directing the course of events involving Silver Buckle. By virtue of this alliance and concerted activity, together with the other relationships discussed above, it is clear that Magnuson was a member of a control group of Silver Buckle. This conclusion is reinforced by the fact that at the moment Magnuson signed the New Park-East Utah contract he was in a position to control in excess of 11 per cent of the Silver Buckle stock then outstanding (not including the shares that had been issued in May 1962 to West Coast in

xchange for West Coast stock).[36/]

Magnuson's controlling position in Silver Buckle grew stronger during ate 1962 and early 1963, and he was elected a director of West Coast in May 963, shortly before Silver Buckle was merged into it in June of that year. etitioners apparently concede that by April 1963 (prior to the O'Brien ransactions) and certainly by the time of the West Coast transaction September 1963), Magnuson was a controlling person of Silver Buckle and West oast (Br. 54, 55, 57, 74, 78). Magnuson's and Golconda's roles as creditors, agnuson's activities in trying to secure financing, his continued efforts to olve West Coast's problems and his election as a director, all as set forth n the history of West Coast at pp. 10 - 15, supra, fully support such a inding.

Petitioners argue that each transaction found to be in violation of the egistration provisions must be viewed separately rather than as part of a ontinuing course of events (Br. 54-55). Although the evidence is sufficient

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36/ The shares controlled by Magnuson are as follows:

Description	Shares
Shares Magnuson acquired in the New Park-East Utah transaction (p. 19, supra).	370,000
Shares Pennaluna acquired in the New Park-East Utah transaction (p. 19, supra).	200,000
Shares of Silver Buckle held by Pennaluna in a "long" position on September 29, 1962 (R. 2394-2399).	13,005
Shares remaining from Oil, Inc. transaction for account of Magnuson individually and as custodian for his children (R. 423-431, 3036-3046).	169,500
Shares owned by Magnuson from a time prior to the Oil, Inc. transaction (R. 423).	542
Shares held by McGee Building, Inc. of which Magnuson was a 49% stockholder (R. 179, 3035).	10,000
Shares held by Golconda Mining Company, of which Magnuson was then an officer, director, and the largest stockholder (R. 179, 2085-2097; 3047-3048)	70,000

to support a finding of control even if petitioners' approach is employed, we submit that such an approach represents an unduly narrow and restrictive application of a broadly remedial statute. In a situation such as the instant one, where the same parties are involved in a series of transactions extending over a substantial period of time, and where these parties have a history of business relationships commencing before the first transaction in question, the correct approach in determining control is to look at the entire period involved, rather than to treat each transaction as an isolated event. Viewed in this manner, it is clear that the Commission properly found Magnuson to be a controlling person throughout the entire period that Silver Buckle and West Coast stock was being distributed.

C. Harrison Knew or Should Have Known That Distributions of Control Stock Were Taking Place.

The Commission found that "Harrison was aware of facts which put him on notice that distributions of control stock might be involved" (R. 4613). There is substantial evidence to support this finding. As the Commission informed the brokerage community in a release entitled "Distribution by Broker-Dealers of Unregistered Securities"[37/] (footnotes omitted):

> . . . [A] dealer who offers to sell, or is asked to sell a substantial amount of securities must take whatever steps are necessary to be sure that this is a transaction not involving an issuer, person in a control relationship with an issuer or an underwriter. For this purpose, it is not sufficient for him merely to accept "self serving statements of his sellers and their counsel without reasonably exploring the possibility of contrary facts."

Harrison, who was Pennaluna's trader, was aware of the restrictions applicable to the sale of unregistered securities by controlling persons (R. 141). As evidenced by the "Brokerage Information Service Reports" which Harrison caused

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37/ Securities Exchange Act Release No. 6721, CCH Fed. Sec. L. Rep. ¶4845.835 (Feb. 2, 1962).

be published between June 1961 and November 1962 (R. 778, 780, 2909), rrison knew of Silver Buckle's interest in Vindicator and of Magnuson's nnection with Vindicator and Lucky Friday. Harrison was aware as early 1961 that Scott might be a controlling person of Silver Buckle (R. 158). was also aware that Magnuson had twice purchased large blocks of Silver ckle stock after coming to some sort of arrangement with Scott.

Harrison knew of Magnuson's conversation with members of the Commis-on's Seattle Office in January 1963 and knew that one of the questions raised as whether Magnuson was a controlling person of Silver Buckle (R. 320). arrison knew of Magnuson's resolve not to sell any more of the stock acquired the New Park-East Utah transaction until this question was settled. Because f this control question, Pennaluna's second block of 100,000 shares acquired n the New Park-East Utah transaction was purchased by Harrison and Magnuson, laced in an envelope marked "Special Transactions" and placed in a bank safety eposit box (p. 27, supra). The possible need for registration had been further mpressed upon Harrison by the March 5, 1963, letter he had received from Scott p. 27, supra, and R. 3319). Yet when Pennaluna began selling off the Silver uckle stock it purchased in the O'Brien transactions, Harrison never asked the ommission, or indeed any attorney whatsoever, if the question of control had been leared up, or if the stock was free to be traded (R. 141,320). Instead, he urportedly relied on two legal opinions which had been given some nine months reviously (Br. 56).

The opinion of New Park's attorneys, addressed to Silver Buckle and ated August 24, 1962 (R. 1439-1440), did not deal with the question of Magnuson's ontrol position (p. 18, supra). The October 5, 1962 legal opinion, prepared by ull's law firm for Magnuson, failed to give consideration to the influence esulting from Magnuson's participation with Scott in the Oil, Inc. and New Park-

East Utah transactions -- a participation of which Harrison was well aware.

As early as January 1963 (R. 269) and at least by April 1963 (R. 309), Harrison was aware that Magnuson was taking an active part in West Coast's affairs. And by the time of the West Coast transaction Harrison knew that Magnuson was a director of West Coast (R. 364).

II. THE COMMISSION'S FINDING THAT PETITIONERS WILLFULLY VIOLATED THE ANTIFRAUD AND ANTI-MANIPULATION PROVISIONS OF THE SECURITIES ACT AND THE EXCHANGE ACT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. In an Administrative Proceeding of a Remedial Nature the Proper Standard of Proof Is the Preponderance of the Evidence.

Petitioners argue that the Commission erred in applying the "preponderance of the evidence" standard of proof in the administrative proceeding below. Petitioners assert that, because misrepresentations were alleged and because of the nature of the sanction imposed by the Commission, the Commission was required to apply a standard "akin to the 'clear and convincing' concept for the proof of fraud in common law actions" (Br. 61-62).

At the outset it should be noted that this argument was never urged before the Commission and, accordingly, under Section 25(a) of the Exchange Act, 15 U.S.C. 78y(a) (see note 29, supra), petitioners are precluded from urging it before this Court.[38/] In any event, petitioners' argument is without merit.

38/ Lile v. Securities and Exchange Commission, 324 F.2d 772, 773 (C.A. 9, 1963); Gearhart & Otis, Inc. v. Securities and Exchange Commission, 348 F.2d 798, 800-801 (C.A. D.C., 1965); Gilligan, Will & Co. v. Securities and Exchange Commission, 267 F.2d 461, 468 (C.A. 2), certiorari denied, 361 U.S. 896 (1959). Cf. National Labor Relations Board v. Int'l Ass'n of Machinists, 263 F.2d 796, 798-99 (C.A. 9, 1959), certiorari denied, 362 U.S. 940 (1960); National Labor Relations Board v. Giustina Bros. Lumber Co., 253 F.2d 371, 374 (C.A. 9, 1958).

As the courts have consistently held, broker-dealer revocation ceedings are remedial and not penal in nature. Their purpose is to tect the public from further violations rather than to punish an dividual for past misconduct. Berko v. Securities and Exchange Commission, 39/ F.2d 137, 141 (C.A. 2, 1963). Indeed, this is true of all civil proceedings er the antifraud provisions. As the Supreme Court said in Securities and change Commission v. Capital Gains Bureau, 375 U.S. 180, 195 (1963) (footnote tted), ". . . securities legislation 'enacted for the purpose of avoiding uds,' [is to be construed] not technically and restrictively, but flexibly effectuate its remedial purposes."

Petitioners concede that "the elements of common law fraud are not uired for securities misrepresentations . . ." (Br. 62). Furthermore, as s Court pointed out in Ellis v. Carter, 291 F.2d 270, 275 & n. 5 (1961), missal aff'd, 328 F.2d 573 (1964), Rule 9(b) of the Federal Rules of Civil cedure, which requires that fraud must be pleaded with particularity, is not licable to private actions under the antifraud provisions of the federal urities laws since a showing of common law fraud is not required. And, ofar as standard of proof is concerned, we know of no Commission enforcement ceeding or private action under the securities laws upholding the application

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Accord, e.g., Pierce v. Securities and Exchange Commission, 239 F.2d 160, 163 (C.A. 9, 1956); Blaise, D'Antoni & Associates v. Securities and Exchange Commission, 289 F.2d 276, 277 (C.A. 5, 1961), rehearing denied per curiam, 290 F.2d 688, certiorari denied, 368 U.S. 899 (1961); Associated Sec. Corp. v. Securities and Exchange Commission, 283 F.2d 773, 775 (C.A. 10, 1960); Wright v. Securities and Exchange Commission, supra, 112 F.2d at 94 (C.A. 2, 1940) (expulsion from membership in national securities exchange).

of the high standard of proof sometimes imposed in cases in which common law fraud is alleged. 40/

In Securities and Exchange Commission v. Capital Gains Bureau, supra, 375 U.S. at 195, the Supreme Court, in dealing with the antifraud provisions of the Investment Advisers Act of 1940, 41/ noted:

> [I]t would be logical to conclude that Congress codified the common law "remedially" as the courts had adapted it to the prevention of fraudulent securities transactions by fiduciaries, not "technically" as it has traditionally been applied in damage suits between parties to arm's-length transactions involving land and ordinary chattels. 42/

The rigorous requirements for the proof of common law fraud are not applicable when allegations are made that a fiduciary has not dealt properly with those to whom he owes his fiduciary duties. Indeed, in many such situations the burden of proof is actually shifted to the fiduciary, who must prove that transactions between them are in all respects fair. E.g., Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 599 (1921). 43/

40/ In the panel decision of the Second Circuit in the Capital Gains case, 300 F.2d 745, 747 & n. 2 (1961), it was stated that fraud under the securities laws must be "established by 'clear and convincing' proof" (footnote omitted). This language was significantly deleted from the en banc decision of that court, 306 F.2d 606 (1962), which closely tracked the panel decision in most other respects and was itself reversed by the Supreme Court because of its narrow view of the statutory concept of fraud.

41/ 15 U.S.C. 80b-6. These provisions parallel the antifraud provisions of the Securities Act and the Exchange Act.

42/ Accord, e.g., Royal Air Properties, Inc. v. Smith, 312 F.2d 210 (C.A. 9, 1962) judgment for plaintiffs aff'd, 333 F.2d 568 (C.A. 9, 1964); Stevens v. Vowell, 343 F.2d 374 (C.A. 10, 1965); Norris & Hirshberg v. Securities and Exchange Commission, 177 F.2d 228 (C.A. D.C., 1949); Charles Hughes & Co. v. Securities and Exchange Commission, 139 F.2d 434 (C.A. 2, 1943), certiorari denied, 321 U.S. 786 (1944).

43/ See generally 24 Am. Jur. Fraud and Deceit § 258 (1st ed. 1939); 37 C.J.S. Fraud § 95 (1943); 9 Wigmore, Evidence § 2503 (3d ed. 1940).

The issue of the proper quantum of proof of fraud in broker-dealer proceedings before the Commission was recently considered in the case of Mammos v. Securities and Exchange Commission, C.A. 2, Docket No. 31469 (Oct. 13, 1967). In that case the Commission had expressly held that the preponderance of the evidence was the appropriate standard of proof in such proceedings.[44/] The court of appeals affirmed the Commission's decision from the bench without opinion. Thus the traditional "preponderance of the evidence" standard applied in the great majority of civil cases was the appropriate standard of proof in the proceedings before the Commission. Wright v. Securities and Exchange Commission, supra, 112 F.2d at 94 (semble).

B. There Is Substantial Evidence to Support the Findings of Fraud and Manipulation.

The Commission found that Harrison and Magnuson made and caused Pennaluna to make false and misleading statements and omissions of material fact concerning the price of Silver Buckle stock, the desirability of West Coast as an investment and West Coast's financial condition (R. 4613-4619). The Commission further found that these misrepresentations, coupled with Pennaluna's bidding and trading in Silver Buckle stock commencing in October 1962 made it clear that Pennaluna and Harrison engaged in a manipulative scheme in the sale of Silver Buckle stock (R. 4613-4619), and that Magnuson was chargeable

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44/ Securities Exchange Act Release No. 8090, at 5 (June 2, 1967). Accord, Underhill Sec. Corp., [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,270 (Aug. 3, 1965); Aviation Investors of America, 41 S.E.C. 566, 571 (1963); MacRobbins & Co., 40 S.E.C. 497, 505, remanded for further consideration sub nom. Kahn v. Securities and Exchange Commission, 297 F.2d 113 (C.A. 2, 1961), and Berko v. Securities and Exchange Commission, 297 F.2d 116 (C.A. 2, 1961), adhered to [1961-1964 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 76,853 (S.E.C., 1962), aff'd sub nom. Berko v. Securities and Exchange Commission, supra, 316 F.2d 137; White & Weld, 3 S.E.C. 466, 539-540 (1938).

with this manipulative conduct (R. 4617). The Commission also found that Pennaluna, Magnuson and Harrison violated Rule 10b-6 (R. 4619).

1. Misrepresentations and Omissions.

A recital of the statements involving misrepresentations and omissions is found at pp. 24-26, supra. In its release of Feb. 2, 1962, p. 44, supra, the Commission stated:

> If . . . a dealer lacks essential information about the issuer, such as knowledge of its financial condition, he must disclose this lack of knowledge and caution customers as to the risk involved in purchasing the securities without it . . . . The mere fact that a security may allegedly be exempt from the registration requirements of the Securities Act of 1933 does not relieve a dealer of these obligations. On the contrary, it may increase his responsibilities, since neither he nor his customers receive the protection which registration under the Securities Act is designed to provide. [emphasis added]

In addition, the Commission has repeatedly held that a broker-dealer must have a reasonable basis before making representations about a security.[45/] The Commission has also repeatedly held that predictions of specific and substantial increases in the price of a speculative security within a relatively short period of time are inherently fraudulent and cannot be justified, whether couched in terms of opinion or fact.[46/] Predictions need not be expressed in terms of a guarantee in order to be fraudulent.[47/] And the fact that a person is a sophisticated investor who usually deals in speculative securities and

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45/ Lawrence, ['66-'67 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,424; (Dec. 30, 1966); MacRobbins & Co., Inc., supra n. 44.

46/ R. Baruch and Co., Securities Exchange Act Release No. 7932, p. 7 (August 9, 1966), CCH Fed. Sec. L. Rep., ¶ 68,169 (not reported in full).

47/ De Mammos, supra, note 44, p. 3.

b knows that the security in question is speculative cannot excuse fraudulent
epresentations made to him.[48] Although these rules have generally been developed
n cases involving broker-dealers and retail customers, the law is basically
h same in cases involving representations and price predictions made by one
ler to another.[49]

The record shows and petitioners concede (p. 26, supra) that Harrison's
oresentations about Silver Buckle were based on rumors which he had heard
m other brokers (R. 607), and that he had never seen any financial statements
Silver Buckle or West Coast. Hence, Harrison's price predictions and false
tements (pp. 24-26, supra) violated the antifraud provisions.

Petitioners urge, however, as they did in the proceeding below that
rrison's statements were merely permissible "chatter" between traders (Br. 46).
e Commission rejected this argument, stating that "the other dealers placed
liance upon Harrison's statements"[50] and that "the teletypes show that he
rported to have and was looked to as a source of specific information regarding
e condition and prospects of Silver Buckle" (R. 4616-4617).[51] Under these

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R. Baruch and Co., supra, p. 7; Floyd Earl O'Gorman, Securities Exchange Act Release No. 7959, pp. 3, 4 (Sept. 22, 1966), CCH Fed. Sec. L. Rep. p. 68,172 (not reported in full); R. A. Holman & Co., Inc., Securities Exchange Act Release No. 7770, p. 9 [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶77,313 (Dec. 15, 1965).

Van Alstyne, Noel & Co., 33 S.E.C. 311 (1952); Gearhart & Otis, Inc., Securities Exchange Act Release No. 7329, p. 23 (June 2, 1964), aff'd 348 F.2d 798 (C.A. D.C., 1965).

Reliance however is not an essential element in establishing a violation of the antifraud provisions. N. Sims Organ & Co., Inc., 40 S.E.C. 573, 575 (1961), aff'd 293 F.2d 78 (C.A. 2, 1961), cert. denied, 368 U.S. 968, (1962)

Petitioners contend that the term "inside" was used in the teletype conversations to refer to the inside, or wholesale price of Silver Buckle and not to "inside information" (Br. 68). But in response to a question from May & Co., "What is the inside on Silver Buckle?" (emphasis added). Harrison replied, "I just got a new Brokerage Information Sheet out on it giving full details" (R. 229). Hence Harrison interpreted the word "inside" to refer to information rather than to price.

circumstances, and in view of the fact that it was obvious to Harrison that the other dealers would pass the Silver Buckle stock on to their retail customers,[52] petitioners' argument concerning "broker's chatter" is without merit.

In any event, this argument of petitioners would, at most, only relate t the violations concerning the price predictions. It would have no bearing upon Harrison's false statements in the teletypes of December 10, 1962, and February 8, 1963. In the February teletype, in response to an inquiry from May & Co., "Are the West Coast people showing a profit each month?" Harrison replied, "Yes, and getting better everyday - every time they open up one [of] those deals its like making a new rich strike in a mine" (p. 25, supra). Harrison made this statement without having seen any West Coast financial statements. As set forth at pp. 9-11, supra, West Coast's operations were in fact losing money each month and all of the archery lanes were in financial trouble.[53] And in the December teletype, Harrison falsely represented to May & Co. that all of the shares from the New Park-East Utah transaction were "off the market" and not for sale[54] when he knew that Pennaluna had acquired 200,000 of the 800,000 shares not bought and retired by Silver Buckle[55] in the transaction and that Pennaluna was actively selling these shares in the market.

52/ May & Co., for example, made sales to retail customers between October 5 and November 23, 1962 (R. 4322, 4324-4325).

53/ Petitioners contend (Br. 69) that had Harrison seen West Coast's financial statements for the eleven months ended Jan. 31, 1963, he would have seen net earnings for that period and a reduced deficit. However, what petition fail to state, and what Harrison would have seen had he looked at the financial statements, was that the earnings resulted from the sale by West Coast of five of its six archery leases, so that West Coast in effect became a company without any operating assets but with a large deficit (see p. 11, supra).

54/ Page 25, supra.

55/ 25% certainly cannot be deemed a "small percentage" (Br. 70).

The statements in these teletypes, and the failure of Harrison at any time to disclose that Pennaluna was selling large blocks of Silver Buckle on the market were clearly in violation of the antifraud provisions.

Petitioners assert that Silver Buckle stock "traded like a mining security" (Br. 70) and that therefore knowledge of the financial condition of the company was not relevant in making an investment decision. Initially, it should be pointed out that one of the prime functions of the securities laws is to promote full disclosure of information regarding companies whose shares are being publicly traded. One of the most important items of information is the financial condition of the company. Thus, petitioners' contention that in certain situations the broker-dealer may determine that financial information is not relevant would, if accepted, completely undermine one of the basic principles of the securities laws. Moreover, in the present case, a number of Harrison's teletype messages contained representations about the financial condition of West Coast. Harrison stated that West Coast's "archery business taking over like wildfire" (p. 25, supra). He also stated that West Coast was making a profit every month, and "getting better everyday" (p. 25, supra). To assert that knowledge of financial information was not relevant at a time when Harrison was making affirmative represen tations about the company's financial condition, is patently absurd.

2. Manipulation of the Market

The facts concerning Pennaluna's bidding and trading activity in Silver Buckl stock following its commitment to purchase 200,000 shares of that stock are set fort at pp. 19-23, supra. The Commission found that, "Pennaluna's bidding and trading . . and its obvious motive for raising the price level," coupled with Harrison's mis-representations and bullish price predictions, "make it clear that Pennaluna and

Harrison engaged in a manipulative scheme in the sale of [Silver Buckle] stock" (R. 4614).[56/]

The Commission found that petitioners' activities had a manipulative purpose -- i.e., that they were designed to raise the price of Silver Buckle stock artificially and to induce other broker-dealers to bid for that stock (R. 4613-4614). The Commission has long held that "since it is impossible to probe into the depths of a man's mind, it is necessary in the usual case that the finding of manipulative purpose be based on inferences drawn from circumstancial evidence."[57/] Pennaluna's commitment in the New Park-East Utah transaction to acquire 200,000 shares of Silver Buckle stock gave Pennaluna a substantial incentive to raise the price of that stock. This incentive, viewed together with Pennaluna's immediate commencement of activities likely to produce that rise, provides ample evidence of a manipulative purpose.[58/] In addition, petitioners offer nothing of substance to avoid the inferences which must be drawn from Pennaluna's pricing activities. Pennaluna was consistently the high bidder

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56/ Petitioners make several assertions (Br. 62-63) as to what the Commission did not find. With respect to the "nonfindings" numbered 1 and 4, neither domination of the market nor a special selling effort is a necessary element of a manipulative scheme. In any event, the Commission did find that from October to December 4, 1962, Pennaluna "did by far the greatest volume of trading in stock" (R. 4614). With respect to numbers 2 and 3, it is obvious that the Commission found the existence of an artificial market and that sales at what petitioners refer to as the "prevailing market" were sales at an artificial p

57/ Federal Corp., 25 S.E.C. 227, 230 (1947). See Note, Regulation of Stock Market Manipulation, 56 Yale L.J. 509, 527 (1947).

58/ Federal Corp., 25 S.E.C. 227, 230 (1947); Thornton & Co., 28 S.E.C. 208 (1948 aff'd, Thornton v. Securities and Exchange Commission, 171 F.2d 702 (C.A. 2, 1948); Bruns, Nordeman & Co., 40 S.E.C. 652, 660 (1961). See generally, III Securities Regulation 1552-1553 (2d ed., 1961).

in the sheets,[59] and only two days after it had acquired 100,000 shares at 20 cents it raised its bid to 22 cents (3 cents higher than the next highest bidder). They offer no explanation of why they were "reaching" for those shares in their bidding when they had a large block available to them, nor of why they made purchases from other dealers and sold to retail customers at prices substantially lower than their bid in the sheets.[60] The clear inference is that their bid was artificial and designed to mislead. These facts, and most significantly Harrison's unwarranted price predictions and assertions about Silver Buckle's prospects, fall precisely into the pattern of a typical manipulative campaign.

Notwithstanding the foregoing substantial evidence of manipulative purpose, petitioners argue (Br. 63-65) that the Commission has not shown a substantial relationship of "proximate cuase" between their actions and the increased market price of Silver Buckle. Petitioners assert that the substantial increase in the market price of Silver Buckle was caused solely by investor demand arising from publicity regarding West Coast's archery installations, and not by their own increased bidding and trading. Their own bidding and trading, they assert, was "normal" and "proper"--i.e., it was merely a response to and in no way a cause of the market in Silver Buckle. In effect, petitioners are arguing that the Commission could not weigh the potential market effect of their activities and

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59/ See pp. 20-23, supra. Petitioners attempt to explain this (Br. 67) by pointing to the fact that on two days another firm exceeded Pennaluna's bid.

60/ The record indicates that on October 1, 1962, while bidding 22 cents in the sh Pennaluna purchased shares for as low as 18 1/2 cents and sold to retail customers for as low as 20 cents (see p. 20, supra).

conclude that, at least in part, those activities achieved the end which petitioners had every motive to attain.

Petitioners' argument, if accepted, would create a much more difficult evidentiary burden than was ever contemplated by Congress. Obviously, investor demand caused by publicity about a company is one of the many factors which may affect the market. Petitioners cannot, however, merely by asserting the presence of such investor demand, deny their own obvious effect upon the market. In view of the relatively slight market effect (R. 1892) caused by the "extensive publicity campaign" carried on prior to the commencement on October 1, 1962 of Pennaluna's increased activity (Br. 65) the Commission could properly conclude that Pennaluna's continually rising bids[61/] and greatly increased trading activity "contributed substantially" to the activity in the market. As the court stated in Securities and Exchange Commission v. Torr, 22 F. Supp. 602, 608 (S.D. N.Y., 1938), in discussing the proof required to establish a manipulation,

> It is extremely difficult to say that the massage of the market due to the activities of the defendants was the only reason why there was trading in Trans-Lux stock. All one can know is that the things above mentioned were done by these defendants, and that at once thereafter there was a noticeable increase in volume of trading in Trans-Lux stock and the rise in price expectable on such increased trading. These facts, coupled with the fact that the defendants . . . planned to make a profit on their option in the stock, are enough . . . .

Moreover, petitioners' argument that it was the publicity concerning West Coast which caused a rise in the price of the stock of Silver Buckle is contradicte

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61/ It is well recognized that progressively rising bids are an indication of a manipulated market. See III Loss, Securities Regulation, 1564 (2d ed. 1961); Collins v. United States, 157 F.2d 409, 410 (C.A. 9, 1946), certiorari denied, 331 U.S. 859 (1947); Gob Shops of America, Inc., 39 S.E.C. 92, 101, (1959).

by a statement Harrison himself made. In his teletype to May & Co. on October 19, 1962, after the intensified bidding and trading activities in Silver Buckle had been going on for over two weeks, Harrison stated that ". . . nobody knows that Silver Buckle owns West Coast" (R. 228). Thus, Harrison admitted that it could not hav been the publicity about West Coast which affected the market in Silver Buckle.

Finally, other statements made by Harrison in teletype conversations provide a strong indication that the market in Silver Buckle was being controlled or manipulated. On October 4, 1962, when the trader for May & Co. asked if he should "go long," Harrison replied: "I'll guarantee it. Don't want market up right now. Certain deals being signed between company and Steen, etc., but it will take off." On October 19, 1962, when the quotations had gone down temporarily and May & Co. inquired as to the reason, Harrison replied: "Salt Lake wants a low quote on it to justify their sale to Silver Buckle--so accommodating them--won't last long, couple days is all. . . ." (See pp. 24-25, supra.) At the very least, these statements serve to refute petitioners' present argument that they had no influence on the market. Taken at their face value, the statements clearly indicate the existence of an artificial market and the presence of a manipulative scheme. 62/

62/ Although the evidence thus supports a finding of a causal relation between Pennaluna's activities and the rise in the general market price, we submit that proof of such a relation is not essential for the finding of a manipulative scheme. In our view, it is necessary to show only that an individual effected a series of transactions at progressively higher prices for the purpose of inducing others to purchase a security, not that the transactions caused a rise in the market. The only relevance of petitioners' assertion that there was investor demand is its bearing upon their purpose in effecting transactions at rising prices; and, as we have shown, there is ample evidence that their purpose was manipulative.

3. Bidding for and Purchasing Securities in Violation of Rule 10b-6.

Petitioners' challenge to the Commission's finding of violations of Rule 10b-6 rests upon the contention that Magnuson was not a controlling person of Silver Buckle. As we have shown, the Commission's finding of control is supported by substantial evidence, and accordingly the Commission properly found violations of Rule 10b-6.

4. Magnuson's Violations

a. Magnuson is chargeable with Harrison's and Pennaluna's fraudulent and manipulative conduct. As the Commission stated (R. 4617), Magnuson

> knew or should have been aware of Pennaluna's increased trading volume in Silver Buckle stock, the firm's increasing bids, the steadily rising price levels, and the incentive for raising the market price which existed by virtue of Pennaluna's ownership of 200,000 shares, an unusually large amount for Pennaluna to acquire at one time. Under these circumstances and by virtue of his position as a partner in Pennaluna and his substantial participation in the profits from the firm's trading in the stock of Silver Buckle as to which he was the partner most directly interested, Magnuson had a duty to keep himself apprised and provide appropriate restraints as to the manner in which such trading was being conducted. 63/ As an active major partner he had a duty to know of the nature and scope of the firm's activities, and being chargeable with knowledge, he must be held to have at least a shared responsibility for the violations which occurred.

b. Moreover, Magnuson himself sold large amounts of West Coast stock to persons other than Pennaluna during the period August 1963 through December 1963 without disclosing the adverse financial condition of West Coast, notwithstanding the fact that the existing public image of West Coast was that of highly successfu enterprise (see pp. 29-30, supra, and the Commissions opinion (R. 4617-18)).

63/ Cf. Alfred Miller, Securities Exchange Act Release No. 8012 (Dec. 28, 1966), p. 6; Thompson & Sloan, Inc., 40 S.E.C. 451, 457 (1961); John T. Pollard & C 38 S.E.C. 594, 598 (1958). [Footnote in original.]

Magnuson was a director and a controlling person of West Coast at this time,[64] and under principles now well established under the antifraud provisions of the securities laws, he was under a duty in his securities transactions to disclose material non-public information known to him by virtue of his position or, in the alternative, to forgo the transactions.[65]

Petitioners assert that Magnuson believed that "there was [a] tangible basis for optimism concerning the eventual financial success of West Coast" (Br. 73), that Magnuson had "confidence in West Coast's future" (Br. 74-75) and that therefore Magnuson was not under a duty to disclose West Coast's adverse financial condition, It is clear, however, that by August 1963 there was no "tangible basis for optimism," and the Commission so found (R. 4618). Moreover, the theory behind the disclosure requirements is that both the insider and the other party to a securities transaction should be able to base their investment decision on the same material information. Hence, assuming arguendo that there was a tangible basis for Magnuson's optimistic beliefs, he would still have had the duty, as an insider, to disclose the then existing adverse financial condition of West Coast to the purchasers of his West Coast stock, so that they could make their own informed decision as to the desirability of investing in the company.[66] This is particularly true in light of the fact that West Coast's favorable public image was one which Magnuson himself had helped create (pp. 29-30, supra). Accordingly, as the Commission stated (R. 4619):

> . . . when the company's actual condition had to Magnuson's knowledge become radically different from the favorable image

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64/ Petitioners admit Magnuson's control position when they admit that his sales of West Coast stock constituted a violation of Section 5 of the Securities Act (Br. 74).

65/ Securities and Exchange Commission v. Texas Gulf Sulphur, 258 F. Supp. 262 (S.D.N.Y., 1966) appeal pending; List v. Fashion Park, Inc., 340 F. 2d 457, 461-62 (C.A. 2), cert. denied, 382 U.S. 811 (1965); Cady, Roberts & Co., 40 S.E.C. 907 (1961).

66/ The fact that "the financial condition of the company was complex" (Br. 74) heightened rather than diminished Magnuson's duty to disclose.

that he knew of and had himself fostered, it was improper for him to sell his shares without disclosure of the grave financial problems facing West Coast.

III. PETITIONERS' OBJECTIONS TO THE CONDUCT OF THE COMMISSION'S STAFF ARE UNTIMELY AND IN ANY EVENT ARE WITHOUT MERIT.

Petitioners raise a number of objections based upon alleged misconduct of the Commission's Division of Trading and Markets in the proceeding below (Br. 75-77). Since these objections were never urged before the Commission,[67/] petitioners are precluded, under Section 25(a) of the Exchange Act, from urging them on this review.[68/] In any event, petitioners' objections are without merit.

67/ Petitioners assert (Br. 77) that "[a]ll of these matters were brought to the attention of respondent [Commission] prior to filing this petition for review" (emphasis added). The only support offered for this assertion is a reference to a document (Supp. R. 4690-4698) entitled Petition and Motion For Further Rehearing, Reconsideration and Review, which was delivered to the Commission's Office of the General Counsel on September 5, 1967 after the filing of their petition for review in this Court (September 1, 1967). That document was forwarded by the Office of the General Counsel to the Secretary of the Commission who refused to accept it for filing "since it was received long [131 days] after the 10-day limit for filing a petition for rehearing pursuant to Rule 21(e) of the Commission's rules of practice had expired" (Supp. R. 4698). Petitioners offered no reason for the untimeliness of their petitio It should be noted in this connection that an earlier petition for rehearin and reconsideration was considered by the Commission even though it too was untimely, having been filed 18 days beyond the time permitted by the rule (R. 4631).

In any event, the petition which was not accpeted for filing (Supp. R. 4690-4698) raised only one of the objections made here (i.e., that petitioners were not advised of the degree of sanction being sought by the Division) and we have been unable to find anything elsewhere in the record indicating that petitioners ever raised any of their other objections befor the Commission.

68/ See p. 46 and note 38, supra.

Petitioners assert (Br. 76) that they waived their right to a hearing and proceeded by way of stipulation directly to oral argument before the Commission "without being advised that revocation and bar was being sought" by the Division. In addition, they appear to be arguing that the Division misled them into believing that after the completion of a stipulation the Division would accept an offer of settlement providing for only a suspension rather than revocation and bar.[69] There is no support for these contentions[70] and in fact the record indicates the opposite of what they contend. The Division's initial brief (R. 3639-3984), filed with the Commission in September 1965, only three months after completion of the stipulation urged the Commission to impose sanctions of revocation and bar. The Division's reply brief (R. 4424-4473), filed in February 1966, reaffirmed this position. Under these circumstances, it is difficult to understand how petitioners can argue that the Division was "inferring" to them that it was rejecting settlement offers only because it "desired the respondent [Commission] to set the number of days and suspension terms" (Br. 76). The claim that petitioners were misled by the Division should be viewed in the light of the fact that throughou the proceeding while the Division was urging the sanctions of revocation and bar, petitioners gave absolutely no indication that they felt they were being misled by the Division.[71] The contention that they were misled is simply an afterthought.

69/ It should be noted, of course, that it is the Commission and not its Division of Trading and Markets which determines whether an offer of settlement will be accepted. See Rule 8(a) of the Commission's Rules of Practice, 17 CFR 201.8(a

70/ Petitioners offer only two concrete facts. First, they quote from a letter dated February 22, 1965 which, in addition to the fact that it is not a part of the record, says nothing more than that the Division expected petitioners to make an offer of settlement (not that such an offer would be accepted by the Division, let alone the Commission). Second, they point to their settlement offer of July 18, 1966, which the Division considered unacceptable. This offer was made only one week prior to oral argument before the Commission.

71/ This connection was first raised in the petition for further rehearing which petitioners attempted to file some four months after the issuance of the Commission's order of revocation. See note 67, supra.

With respect to the claim that the Division took the testimony of Anthony Vaghi without notice to petitioners' counsel (Br. 76-77), petitioners fail to state in their brief that Vaghi's testimony was included in the record by way of stipulation between themselves and the Commission's staff (R. 4226-4227). Petitioners offer no reason why they did not request an opportunity to cross-exami Vaghi prior to stipulating, or even for that matter, why they did not object to th inclusion of the testimony in the stipulation. Indeed, petitioners raised no objection to the Division's action until their brief was filed in this review proceeding and have never requested an opportunity to cross-examine Vaghi.[72/]

Finally, with respect to petitioners' other objections (Br. 77), Division counsel did not go beyond the scope of the stipulation in oral argument before the Commission,[73/] and petitioners' "belief" that memoranda concerning Harrison were submitted ex parte to the Commission by the Division is without record suppor

IV. THE SANCTIONS IMPOSED BY THE COMMISSION WERE WELL WITHIN ITS DISCRETIONARY AUTHORITY.

Petitioners argue (Br. 78) that the Commission failed to consider or proper evaluate certain factors in making the statutory determination of what sanctions should be imposed in the "public interest." Quite to the contrary, it is clear from the Commission's opinion (R. 4608-4621) and from the Commission's order denyi

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72/ Vaghi's testimony was taken only after petitioners had obtained an affidavit from him and had requested that the affidavit be placed in a supplemental stipulation (R. 4310-13). Moreover, contrary to the implication in petitione brief (Br. 77), Vaghi was advised of his right to be represented by counsel stated that he wished to proceed without counsel (R. 4478).

73/ Even if petitioners were correct in asserting (Br. 71) that counsel for the Division had wrongly implied that Harrison knew certain adverse information about Silver Buckle and West Coast, it is clear, in any event, that Harrison was not prejudiced, since the Commission's finding of antifraud violations by him did not depend on his possession of adverse information. See pp. 49-58, supra.

a petition for reconsideration (R. 4661-4662) that the Commission considered and weighed each of the factors which petitioners assert were not considered. 74/ In its opinion, the Commission, after setting forth the factors which petitioners had presented as bearing upon the public interest, stated (R. 4621):

> [T]he factors referred to by respondents cannot overcome the serious nature of the violations we have found. In view of these violations, we conclude that it is in the public interest to bar Harrison and Magnuson . . . , to expel Harrison from membership in the Spokane Stock Exchange, and . . . to revoke registrant's broker-dealer registration.

In its order denying the petition for reconsideration, the Commission concluded that "[i]n view of the serious violations . . . found, . . . the additional material submitted by petitioners did not warrant a modification of the sanctions imposed."

As this Court noted only a year ago in reviewing another Commission order entered under the Exchange Act:

> Where the established facts empower an administrative agency to take particular remedial action, the determination of whether it should take that action rests within the sound discretion of the agency. 75/

74/ Insofar as petitioners refer to pages 4671 to 4689 of their Supplemental Record as material which should have been considered by the Commission, none of this material was ever submitted by them to the Commission. Included in this material are two letters from Bernard G. Lonctot to Commissioner Owens, dated May 27, 1966 (Supp. R. 4678-4680) and March 5, 1965 (Supp. R. 4687-4689), but those letters were ex parte communications and under the Commission's rules concerning such communications could not be considered in the proceeding. (See Section 200.111 of the Commission's Code of Behavior Governing Ex Parte Communications, 17 CFR 200.111.)

75/ San Francisco Mining Exchange v. Securities and Exchange Commission, 378 F. 2d 162, 165 (1967) (citing Consolo v. Federal Maritime Commission, 383 U.S. 607, 620-621; Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 208; American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 112-113). The Commission's order in the Mining Exchange case withdre the registration of a national securities exchange.

It was also stated in the Mining Exchange case, 378 F. 2d at 165, that the Commission "was not required to accord controlling weight to testimonials" which concerned the "desirability of continuing the Exchange in operation" but which "did not, in the main, deal with the merits of the case. . . ."

Similarly, in Pierce v. Securities and Exchange Commission, 239 F.2d 160 (1956), this Court stated, id. at 163:

> . . . The Commission is given the duty to protect the public. What will protect the public must involve, of necessity, an exercise of discretionary determination. This Court ordinarily should not substitute its judgment of what would be appropriate under the circumstances in place of the Commission's judgment as to measures necessary to protect the public interest. . . . 76/

In view of the numerous and serious violations by petitioners of the registration and antifraud provisions, as well as their violations of various other provisions of the securities laws, the sanctions imposed by the Commission were well within its discretionary authority.

76/ Accord, Tager v. Securities and Exchange Commission, 344 F.2d 5, 8-9 (C.A. 2 1965); Berko v. Securities and Exchange Commission, 316 F.2d 137, 141-142 (C.A. 2, 1963); Wright v. Securities and Exchange Commission, 112 F.2d 89, 95-96 (C.A. 2, 1940); cf. Marketlines, Inc. v. Securities and Exchange Commission, 384 F.2d 264, 267 (C.A. 2, 1967), certiorari denied, 36 U.S.L.W. 3343 (March 4, 1968).

CONCLUSION

For the foregoing reasons the orders of the Commission should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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STATUTORY APPENDIX

curities Act:

Definitions

SEC. 2. When used in this title, unless the con-xt otherwise requires—

* * *

(2) The term "person" means an individual, a rporation, a partnership, an association, a joint-ock company, a trust, any unincorporated or-nization, or a government or political subdivi-on thereof. As used in this paragraph the term rust" shall include only a trust where the interest interests of the beneficiary or beneficiaries are idenced by a security.

* * *

(11) The term "underwriter" means any per-n who has purchased from an issuer with a view , or offers or sells for an issuer in connection th, the distribution of any security, or partici-tes or has a direct or indirect participation in ny such undertaking, or participates or has a par-cipation in the direct or indirect underwriting any such undertaking; but such term shall not clude a person whose interest is limited to a mmission from an underwriter or dealer not excess of the usual and customary distributors' sellers' commission. As used in this paragraph e term "issuer" shall include, in addition to an suer, any person directly or indirectly control-ng or controlled by the issuer, or any person nder direct or indirect common control with the suer.

* * *

Exempted Transactions

SEC. 4. The provisions of section 5 shall not pply to—

(1) transactions by any person other than an suer, underwriter, or dealer.

(2) transactions by an issuer not involving ny public offering.

(3) transactions by a dealer (including an nderwriter no longer acting as an underwriter n respect of the security involved in such trans-ction), except—

(A) transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter,

(B) transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 8 is in effect as to the security), or such shorter period as the Commission may specify by rules and regulations or order, and

(C) transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

With respect to transactions referred to in clause (B), if securities of the issuer have not previously been sold pursuant to an earlier effective registration statement the applicable period, instead of forty days, shall be ninety days, or such shorter period as the Commission may specify by rules and regulations or order.

(4) brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders.

* * *

Prohibitions Relating to Interstate Commerce and the Mails

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * *

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

* * *

Fraudulent Interstate Transactions

SEC. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Rules Under the Securities Act:

Rule 405 Definitions of Terms

Unless the context otherwise requires, all ter used in this regulation or in the forms for reg tration have the same meanings as in the Act a in the General Rules and Regulations. In ad tion, the following definitions apply, unless t context otherwise requires:

* * *

Control.—The term "control" (including t terms "controlling," "controlled by" and "und common control with") means the possession, d rect or indirect, of the power to direct or ca the direction of the management and policies a person, whether through the ownership voting securities, by contract, or otherwise.

* * *

Exchange Act:

Definitions and Application of Title

SECTION 3. (a) When used in this title, unless the context otherwise requires—

* * *

(18) The term "person associated with a broke or dealer" means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, including any employee of such broker or dealer, except that for the purposes of section 15(b) of this title (other than paragraph (7) thereof), persons associated with a broker or dealer whose functions are clerical or ministerial shall not be included in the meaning of such term. The Commission may by rules and regulations classify for the purpose of any portion or portions of this title, persons, including employees, controlled by a broker or a dealer.

* * *

rohibition Against Manipulation of Security Prices

TION 9. (a) It shall be unlawful for any , directly or indirectly, by the use of the or any means or instrumentality of inter- ommerce, or of any facility of any national ies exchange, or for any member of a na- securities exchange—

* * *

To effect, alone or with one or more other s, a series of transactions in any security ered on a national securities exchange cre- actual or apparent active trading in such ty or raising or depressing the price of such ty, for the purpose of inducing the purchase e of such security by others.

* * *

ation of the Use of Manipulative and Deceptive Devices

TION 10. It shall be unlawful for any person, ly or indirectly, by the use of any means or mentality of interstate commerce or of the or of any facility of any national securities nge—

To effect a short sale, or to use or employ op-loss order in connection with the purchase e, of any security registered on a national ties exchange, in contravention of such rules egulations as the Commission may prescribe cessary or appropriate in the public interest the protection of investors.

To use or employ, in connection with the ase or sale of any security registered on a nal securities exchange or any security not so ered, any manipulative or deceptive device or ivance in contravention of such rules and ations as the Commission may prescribe as sary or appropriate in the public interest or e protection of investors.

* * *

Over-the-Counter Markets

Section 15. (a)(1) No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section.

* * *

(b)(1) A broker or dealer may be registered for the purposes of this section by filing with the Commission an application for registration, which shall contain such information in such detail as to such broker or dealer and any persons associated with such broker or dealer as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine.

* * *

(5) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—

* * *

(D) has willfully violated any provision of the Securities Act of 1933, or of the Investment Advisers Act of 1940, or of the Investment Company Act of 1940, or of this title, or of any rule or regulation under any of such statutes.

(E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933, or the Investment Advisers Act of 1940, or the Investment Company Act of 1940, or of this title, or of any rule or regulation under any of such statutes or has failed reasonably to supervise, with a view to preventing violations of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this clause (E) no person shall be deemed to have failed reasonably to supervise any person, if—

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(F) is subject to an order of the Commission entered pursuant to paragraph (7) of this subsection (b) barring or suspending the right of such person to be associated with a broker or dealer, which order is in effect with respect to such person.

* * *

(7) The Commission may, after appropriate notice and opportunity for hearing, by order censure any person, or bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer, if the Commission finds that such censure, barring, or suspension is in the public interest and that such person has committed or omitted any act or omission enumerated in clause (A), (D) or (E) of paragraph (5) of this subsection or has been convicted of any offense specified in clause (B) of said paragraph (5) within ten years of the commencement of the proceedings under this paragraph or is enjoined from any action, conduct, or practice specified in clause (C) of said paragraph (5). It shall be unlawful for any person as to whom such an order barring or suspending him from being associated with a broker or dealer is in effect, willfully to become, or to be, associated with a broker or dealer, without the consent of the Commission, and it shall be unlawful for any broker or dealer to permit such a person to become, or remain, a person associated with him, without the consent of the Commission, if such broker or dealer knew, or in the exercise of reasonable care, should have known, of such order.

* * *

)(1) No broker or dealer shall make use of emails or of any means or instrumentality of terstate commerce to effect any transaction in, or nduce the purchase or sale of, any security ner than commercial paper, bankers' accept-s, or commercial bills) otherwise than on a ional securities exchange, by means of any ipulative, deceptive, or other fraudulent device ontrivance. The Commission shall, for the poses of this subsection, by rules and regula-s define such devices or contrivances as are ipulative, deceptive, or otherwise fraudulent.

* * *

Powers With Respect to Exchanges and Securities

ECTION 19. (a) The Commission is authorized, n its opinion such action is necessary or ap-priate for the protection of investors—

* * *

) After appropriate notice and opportunity hearing, by order to suspend for a period not eding twelve months or to expel from a na-al securities exchange any member or officer eof whom the Commission finds has violated provision of this title or the rules and regula-s thereunder, or has affected any transaction any other person who, he has reason to be-, is violating in respect of such transaction provision of this title or the rules and regula-s thereunder.

* * *

Court Review of Orders

ECTION 25. (a) Any person aggrieved by an er issued by the Commission in a proceeding er this title to which such person is a party obtain a review of such order in the Court of peals [1] of the United States, within any circuit rein such person resides or has his principal e of business, or in the United States Court Appeals for the District of Columbia,[2] by filing uch court, within sixty days after the entry of order, a written petition praying that the er of the Commission be modified or set aside hole or in part. A copy of such petition shall orthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole or in part.[3] No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * *

Rules Under the Exchange Act:

Rule 10b–5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

* * *

Rule 10b–6. Prohibitions Against Trading by Persons Interested in a Distribution

(*a*) It shall constitute a "manipulative or deceptive device or contrivance" as used in section 10(b) of the Act for any person,

(1) who is an underwriter or prospective underwriter in a particular distribution of securities, or

(2) who is the issuer or other person on whose behalf such a distribution is being made, or

(3) who is a broker, dealer, or other person who has agreed to participate or is participating in such a distribution, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right until after he has completed his participation in such distribution:

* * *

Rule 15c1–2. Fraud and Misrepresentation

(*a*) The term "manipulative, deceptive, other fraudulent device or contrivance," as u in section 15(c)(1) of the Act, is hereby defi to include any act, practice, or course of busir which operates or would operate as a fraud deceit upon any person.

(*b*) The term "manipulative, deceptive, other fraudulent device or contrivance," as u in section 15(c)(1) of the Act, is hereby defi to include any untrue statement of a material and any omission to state a material fact necess in order to make the statements made, in the li of the circumstances under which they are m not misleading, which statement or omissio made with knowledge or reasonable grounds to lieve that it is untrue or misleading.

(*c*) The scope of this rule shall not be ited by any specific definitions of the term "ma ulative, deceptive, or other fraudulent devic contrivance" contained in other rules ado pursuant to section 15(c)(1) of the Act.

* * *

Code of Behavior Governing Ex Part Communications Between Persons Outside the Commission and Decisio Employees:

Section 200.111 Prohibitions; Applicat Definitions; Limitations.

(a) Except as set forth in Section 200.11 hereof, no person who is not an employee o Commission should make any unauthorize parte communication directly or indirectly a an on-the-record proceeding to any Commi member or decisional employee or solicit any person to make an ex parte communication v the solicitor has reason to know is unauthor nor should any Commission member or decis employee in a proceeding request or conside unauthorized ex parte communication.

* * *